

United States 9
Circuit Court of Appeals
For the Ninth Circuit

WISE MANUFACTURING COMPANY
(a corporation),

Appellant,

vs.

E. W. OLIN, RALPH SITES and
BERKELEY PATTERN WORKS,

Appellees.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Northern District of California,
Southern Division.

FILED

NOV 28 1934

PAUL P. O'BRIEN,

CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the Southern Division of the United States District Court, for the Northern District of California, Second Division Thereof.

No. 23,049-S

In the Matter of

WISE MANUFACTURING COM-
PANY (a corporation),
Respondent.

INVOLUNTARY PETITION IN
BANKRUPTCY.

The petition of E. W. Olin, Ralph Sites and Berkeley Pattern Works, respectfully show:

I.

That your petitioners are resident of the Southern Division of the United States District Court, for the Northern District of California.

II.

That the Wise Manufacturing Company, a corporation, respondent herein, at all times herein mentioned was, and now is a corporation, duly organized under the laws of the State of California, authorized to do business within the State of California, with its principal place of business in the City of Berkeley, County of Alameda, State of California, and its business is that of manufacturing, selling and distributing tools, dies, equipment and patented articles.

III.

That said respondent owes debts in excess of the amount of \$10,000.00 and is now insolvent; that said respondent is not a wage earner, nor a person engaged in farming or the tillage of the soil, and is not a municipal railroad, or an insurance, or banking corporation.

IV.

That your petitioners are creditors of said respondent, having provable claims, amounting in the aggregate in excess of [1]* any security held by them, to the sum of \$500.00 and over; that the nature and amounts of your petitioners' claims are as follows:

That your petitioner E. W. Olin has a claim against the said respondent in the sum of \$239.34, the same being for the balance due and owing upon a judgment rendered against the said respondent.

That your petitioner Ralph Sites has a claim against said respondent in the total sum of \$1029.96 of which \$450.00 is for the balance due and owing upon a promissory note made by said respondent in favor of your petitioner Ralph Sites; of which \$483.96 is for the balance due and owing upon a judgment rendered against said respondent; and, of which \$96.00 is for work and labor done and performed for and at the request of the said respondent.

*Page numbering appearing at the foot of page of original certified Transcript of Record.

That your petitioner the Berkeley Pattern Works has a claim against the said respondent in the sum of \$183.50, the same being for work and labor done and for goods sold and delivered for and at the request of the said respondent.

V.

That said respondent is insolvent and within four months next preceding the date of this petition said respondent committed the following acts of bankruptcy:

(a) Said respondent has permitted the sale of certain of its tools and equipment to persons at this time unknown to your petitioners, and has used the proceeds thereof to pay certain of its creditors, the names of whom are at this time unknown to your petitioners, in preference to the rest and remainder of respondent's creditors, including your petitioners herein;

(b) That said respondent has abandoned its business and permitted its assets to be dissipated and squandered to the irreparable damage and injury of its creditors.

VI.

That said respondent is not now engaged in business, and has [2] failed and refused to pay any of its creditors and your petitioners are informed and believe and therefore allege, that said respondent has by means of chattel mortgages, fictitiously permitted, condoned and caused to be sold and fore-

closed all of its real and personal property, leaving the respondent void of any assets with which to pay its creditors to the irreparable injury and damage of said creditors, including your petitioners herein.

WHEREFORE, your petitioners pray that service of this petition, with a subpoena, may be made upon the Wise Manufacturing Company, a corporation, as provided in the Acts of Congress relating to bankruptcy, and that it may be adjudged by the Court to be a bankrupt within the prevue of said Acts.

E. W. OLIN,
R. SITES,
BERKELEY PATTERN WKS.,
R. Vosbrink,
Petitioners.

F. B. CERINI,
Attorney for Petitioners.

UNITED STATES OF AMERICA,
District of California,
City and County of San Francisco.—ss.

E. W. OLIN, RALPH SITES and R. VOSBRINK, being three of the petitioners above named, do hereby make solemn oath that the statements contained in the foregoing petition, subscribed by them, are true.

E. W. OLIN,
R. SITES,
BERKELEY PATTERN WKS.,
R. Vosbrink.

Subscribed and sworn to before me this 28 day of March, 1933.

[SEAL] ANTONIO M. COGLIANDRO,
Notary Public in and for the City and County
of San Francisco, State of California.

My commission expires Dec. 31, 1934.

[Endorsed]: Filed Mar. 30, 1933, 9:50 A. M.
Walter B. Maling, Clerk. [3]

[Title of Court and Cause.]

ORDER GRANTING RESPONDENT'S MO-
TION TO DISMISS AND GRANTING
PETITIONER'S LEAVE TO FILE AN
AMENDED INVOLUNTARY PETITION
IN BANKRUPTCY.

Pursuant to the stipulation entered into by and between the parties hereto, on file herein, it is hereby ordered by the Court that the Motion to Dismiss of the Respondent, Wise Manufacturing Company, on file herein, be granted;

IT IS FURTHER ORDERED by the Court that the petitioners, E. W. Olin, R. Sites, and Berkeley Pattern Works be and they are hereby granted until the 8th day of June within which to file an Amended Involuntary Petition in Bankruptcy.

Dated, San Francisco, California.

May 31, 1933.

A. F. ST. SURE,
District Judge.

[Endorsed]: Filed May 31, 1933, 11:49 A. M.
Walter B. Maling, Clerk. [4]

In the Southern Division of the United States
District Court, for the Northern District of
California.

No. 23,049-S

In the Matter of
WISE MANUFACTURING COM-
PANY (a corporation),
Respondent.

AMENDED INVOLUNTARY PETITION
IN BANKRUPTCY.

The petition of E. W. Olin, Ralph Sites and
Berkeley Pattern Works respectfully shows:

I.

That your petitioners are residents of the South-
ern Division of the United States District Court,
for the Northern District of California.

II.

That the Wise Manufacturing Company, a cor-
poration, respondent herein, at all times herein
mentioned was, and now is a corporation duly or-
ganized under the laws of the State of California,
authorized to do business within the State of Cali-
fornia, with its principal place of business in the
City of Berkeley, County of Alameda, State of

California, and its business is that of manufacturing, selling and distributing tools, dies, equipment and patented articles.

III.

That said respondent owes debts in excess of the amount of \$10,000, and is now insolvent; that said respondent is not a wage earner, nor a person engaged in farming or the tillage of the [5] soil, and is not a municipal railroad, or an insurance, or banking corporation.

IV.

That your petitioners are creditors of said respondent, having provable claims amounting in the aggregate in excess of any security held by them, to the sum of \$500 and over; that the nature and amounts of your petitioners' claims are as follows:

That your petitioner E. W. Olin has a claim against the said respondent in the sum of \$239.34, the same being for the balance due and owing upon a judgment rendered against the said respondent.

That your petitioner Ralph Sites has a claim against said respondent in the total sum of \$1,029.96 of which \$450 is for the balance due and owing upon a promissory note made by said respondent in favor of your petitioner Ralph Sites; of which \$483.96 is for the balance due and owing upon a judgment rendered against said respondent; and of which \$96 is for work and labor done and performed for and at the request of the said respondent.

That your petitioner Berkeley Pattern Works has a claim against the said respondent in the sum of \$183.50, the same being for work and labor done and for goods sold and delivered for and at the request of the said respondent.

V.

That said respondent is insolvent, and within four months next preceding the date of this petition said respondent committed the following acts of bankruptcy:

(a) That said respondent has concealed part of its property with intent to hinder, delay and defraud its creditors, to-wit:

That Roy T. Wise, president of respondent corporation, [6] entered into a written contract on or about the 27th day of February, 1930, with Ambrose N. Diehl, of Pittsburg, Pennsylvania, and Will H. Hays, of Sullivan, Indiana. Said contract recited that Roy T. Wise controlled the respondent corporation and would cause said respondent to transfer and assign to the Wise Patent & Development Company, a corporation to be organized under the laws of the State of Delaware by the said Will H. Hays, Ambrose N. Diehl and Roy T. Wise, all its right, title and interest to certain United States patents covering and connected with the Wise Multi-Speed Transmission, in consideration of the sum of \$75,000 to be paid to the respondent by the said Will H. Hays, Ambrose N. Diehl and Roy T. Wise. That said United States patents, being the only assets of any considerable value owned by re-

spondent, were transferred and assigned to the Wise Patent & Development Company, a Delaware corporation, by respondent in accordance with the provisions of the above mentioned contract. That no consideration was or ever has been received by the respondent for said United States patents. That the consideration named in said contract is sufficient to satisfy all claims of creditors. That said contract, as a valuable asset of respondent corporation, was and has been secreted and wholly concealed by respondent corporation from the creditors of respondent corporation, with intent to delay, hinder and defraud said creditors. That said contract was never recorded or registered of record by respondent, and that your petitioners were totally unaware of the existence of said contract and had no knowledge thereof until the 30th day of March, 1933, on which day the existence of said contract was first revealed to your petitioners.

(b) That said respondent has concealed part of its property, with intent to hinder, delay and defraud its creditors, [7] to-wit:

That the said respondent through its president Roy T. Wise, during the months of June, July and August, 1931, caused to be sold and did sell certain tools, machinery and equipment belonging to said respondent to persons unknown to your petitioners. That respondent received the approximate sum of six hundred and five dollars (\$605) from said sales. That said respondent, through its president Roy T. Wise, with intent to hinder, delay and defraud its creditors, caused the said approximate

sum of six hundred and five dollars (\$605) to be deposited in the West Berkeley Branch of the Bank of America, Berkeley, California, in the name of H. Jacobson. That the above mentioned sum of six hundred and five dollars (\$605) is the property of respondent, and was and has been concealed and secreted by the said Roy T. Wise from the creditors of the respondent. That your petitioners were totally unaware of the said sale and fraudulent concealment of these assets, and had no knowledge thereof until the 27th day of April, 1933, on which date the above mentioned transaction was first revealed to your petitioners.

VI.

That said respondent is not now engaged in business, and has failed and refused to pay any of its creditors.

WHEREFORE, your petitioners pray that the respondent Wise Manufacturing Company may be adjudged by the Court to be a bankrupt within the prevue of the Acts of Congress relating to bankruptcy.

E. W. OLIN,
BERKELEY PATTERN WORKS,
By.....,

Petitioners.

FLOYD B. CERINI,

Attorney for Petitioners. [8]

STATE OF CALIFORNIA,
City and County of San Francisco.—ss.

FLOYD B. CERINI, being first duly sworn, deposes and says:

That he is an attorney at law duly admitted to practice before all Courts of the State of California and the United States District Court for the Northern District of California, and has his office at No. 550 Montgomery Street, in the City and County of San Francisco, State of California, and is attorney for the petitioners in the above entitled action. That said petitioners are not residents of the City and County of San Francisco and are not within said city and county, and for that reason affiant makes this verification for and on behalf of said petitioners, and by their authority. That affiant has obtained personal knowledge of the facts set forth in said amended petition from documents and interviews with said petitioners. That he has read the foregoing amended petition and knows the contents thereof, and that the same is true to the best of his knowledge, information and belief.

FLOYD B. CERINI.

Subscribed and sworn to before me this 7th day of June, 1933.

[Seal] ANTONINO M. COGLIANDRO,

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Jun. 7, 1933, 11:58 A. M.
Walter B. Maling, Clerk. [9]

[Title of Court and Cause.]

ANSWER.

Comes now the respondent, the Wise Manufacturing Company, and answers the amended involuntary petition in bankruptcy herein, as follows:

(1)

Referring to the creditors' claims mentioned in paragraph IV of said petition, the respondent corporation alleges:

Said claims arose after the making of the contract mentioned in paragraph V(a) of the petition and after the sales referred to in paragraph V(b) of the petition, and after the deposit referred to in paragraph V(b) of the petition.

(2)

Respondent denies that it has concealed part of its property with intent to hinder, delay or defraud its creditors and respondent particularly denies the acts of concealment detailed in paragraph V of the said petition. [10]

(2a)

Respondent admits that on February 27, 1930, Roy T. Wise, the president of the respondent corporation, executed the written contract mentioned in paragraph V(a) of the petition, and that said contract recited that said Roy T. Wise controlled the respondent corporation and would cause said respondent corporation to transfer and assign to

the Wise Patent and Development Company, a corporation, to be organized under the laws of the State of Delaware, by Will H. Hays, Ambrose N. Diehl and Roy T. Wise, all its right, title and interest to certain United States patents and patent rights, covering and connected with the Wise Multi-Speed Transmission, but the respondent denies that the consideration agreed to be paid for the transfer referred to was the sum of \$75,000.00, or that it was agreed that said Hays, Diehl and Wise, or any of them, was to make said payment. On the contrary, it was specifically agreed in said written contract that the \$75,000.00 referred to in said amended petition was to be paid by the new corporation to be formed, to-wit, the Wise Patent and Development Company, and in accordance with paragraph (7) of said written contract, and not otherwise. That said paragraph (7) of said written contract read as follows:

“7. It is further agreed by the parties hereto after such patents and rights are vested in said company, all as herein provided for, that such company shall further endeavor to develop by license, sale or otherwise the said device known as the Wise Multi-Speed Transmission, with all improvements thereon, and shall further proceed so to develop, market and license any other patents of merit which may be accepted by it to the best of its ability and from the proceeds received by the said company for such activity cash payments up to the sum of Seventy-five Thousand Dollars (\$75,000.00) shall be made to the Wise Manufacturing Company from

surplus accumulating over the expense of operating such proposed Wise Patent and Development Company at such times as funds are available; such payment of such sums up to said Seventy-five Thousand Dollars (\$75,000.00) to be by way of reimbursement to the party of the first part and the California companies above mentioned which he controls for expenditures to date in connection with the development of the patents, together with substantial [11] addition. It is understood that neither the physical properties nor any of the capital stock of the Wise Manufacturing Company are to be transferred at this time to the Wise Patent and Development Company as any part of this transaction;”

That when said agreement of February 27, 1930, was made the Standard Die and Tool Company, Incorporated, a California corporation, owned most of the stock in said Wise Manufacturing Company, respondent herein, and said agreement of February 27, 1930, further recited that by stock ownership or otherwise the Standard Die and Tool Company, Incorporated, a corporation, was interested in the patents and patent rights therein referred to.

That said Standard Die and Tool Company, Incorporated, after the forming of the Wise Manufacturing Company, had transferred a large portion of its assets to said Wise Manufacturing Company in consideration of the issuance of most of the outstanding stock of said Wise Manufacturing Company, and in consideration of an agreement by said Wise Manufacturing Company to pay the debts of

said Standard Die and Tool Company, Incorporated. That the intention was to have the first company be interested in the marketing of the products of the second company, and that the second company should be the manufacturing concern. That on February 27, 1930, said two companies were considerably indebted, and it had become important to the stockholders and creditors of said companies that the said Roy T. Wise should make an effort to cause said Hays and said Diehl or someone else similarly situated to become interested in the plan to manufacture, use and market the articles covered by said patents and patent rights. That the aforesaid necessities contributed in causing the making of the agreement of February 27, 1930. Said Wise was also interested in the patents and patent rights which were the subject of said agreement of February 27, 1930. [12]

That the said older companies, the Wise Manufacturing Company and the Standard Die and Tool Company, Incorporated, are herein referred to as the California corporations.

Said agreement of February 27, 1930, also provided that the title of the newly formed company, the Wise Patent and Development Company, in the said patents and patent rights covered by said agreement was to be made perfect, and that this was to be accomplished through the obtaining of all necessary transfers of said patents and patent rights, and also through the acquiring of all of the stock in said California corporations referred to, and said agreement contemplated that by the funds derived

through said contract and by contracts made with said new company, said California corporations would be put in a position to pay their debts, which were large in amount. That said agreement of February 27, 1930, further contemplated that said California corporations would have the advantage of the efforts and aid of said Hays and Diehl and said new Company in marketing and making use of said patents and patent rights and of the articles covered thereby.

That in the matters connected with the making of and in the transactions connected with the making of said agreement of February 27, 1930, and the agreements modifying said agreement, said Roy T. Wise was representing said California corporations, notwithstanding the separate plan of said agreements that the stock of the stockholders in said California corporations would be acquired if that was possible. That said patents and patent rights were to be transferred to the new company, even though all of the stock of the California corporations was not acquired in connection with the transfer.

That the patents and patent rights referred to and any interest of the said Wise therein were transferred to said [13] new company, pursuant to said agreement of February 27, 1930, and the agreements modifying the same.

That the said agreement of February 27, 1930, provided that the new corporation to be formed should have 1200 shares of capital stock.

That on May 8, 1930, the three parties to said agreement of February 27, 1930, agreed in writing to change said agreement of February 27, 1930.

That said agreement of May 8, 1930, provided that the new corporation should have 2500 shares.

That each agreement provided for the issuance of certain shares to the three parties and for certain uses of the shares remaining after the issuance of the shares to the three parties.

The said agreement of May 8, 1930, particularly provided that as the said Hays and Diehl had made advances to said Wise in connection with the carrying out of the plan involved in the two agreements, and in protecting and perfecting said patents and patent rights for the purpose of making the same usable and marketable, these advances should be repaid before any of the \$75,000.00 mentioned in Paragraph (7) of the agreement of February 27, 1930, should be paid. That the advances referred to have not been paid, and in fact nothing has been derived through the operations provided for in Paragraph (7) of said agreement of February 27, 1930. That said agreement of May 8, 1930, also provided that the Wise Patent and Development Company should make certain loans to the said Roy T. Wise, which should be secured, as therein provided, and that such security should include the shares of the stock in the new Company that it was agreed should be issued to said Wise.

That in many other particulars said agreement of [14] May 8, 1930, modified said agreement of February 27, 1930.

That on September 1, 1930, the said two previous agreements were further modified by written agreement executed by the same three parties, and that by said agreement of September 1, 1930, the provisions of Paragraph (7) of said agreement of February 27, 1930, as the same had been modified by the agreement of May 8, 1930, were abrogated, and eliminated from the agreements of the said three parties. That by this time, and particularly through the efforts of said Hays and Diehl, the Westinghouse Electric and Manufacturing Company had entered into a contract with said Wise Patent and Development Company, whereby for certain interests in said patents and patent rights said Westinghouse Electric and Manufacturing Company was to pay certain sums to said Wise Patent and Development Company. That said agreement of September 1, 1930, provided that the said Roy T. Wise was entitled to a certain sum of \$10,000.00 paid by the Westinghouse Electric and Manufacturing Company, and would be entitled to a certain additional sum of \$25,000.00 which said last named company might pay but that said sums would have to be paid as mere credits on a note for \$40,000.00 which had been executed by the said Wise Patent and Development Company to the Westinghouse Electric and Manufacturing Company on August 30, 1930, the said note having been made and having been endorsed by said three parties to raise money to meet the expense of carrying out the plan of said three contracts to perfect the title to and make use of and market said patents and patent rights.

That the said Roy T. Wise was the president of said California companies last referred to, and that he undertook to act for said two companies, and that he at all times acknowledged that any consideration received by him through [15] the transactions represented by said three contracts would be the property of said companies in proportion to their interests in the subject matter of said contracts.

Respondent denies that the making of said contracts or of any of them or the existence of any of said contracts or any of them was concealed, for the purpose of hindering, delaying or defrauding any creditor or creditors of respondent, but the object and purpose thereof was to pay all the debts of said companies and satisfy all demands of stockholders thereof. That in fact the plan of said contracts was almost perfected. That in connection with the making of said contracts and in connection with the transactions represented thereby a large amount of money was loaned and advanced to said California companies by said Wise Patent and Development Company, and that thereby approximately the sum of \$20,000.00 was obtained which was used in paying debts of said companies. That said debts were paid through the Bank of America, in Berkeley. That the making of said contracts and the raising of the money to pay said debts was a well-known transaction that was not concealed. That moreover the transaction of buying up the stock in said California corporations was handled through the Bank of America in Berkeley, California. That the stockholders of said companies executed options and left

the same with said bank, and that the only stock that was not finally taken up was the preferred stock of the Standard Die and Tool Company, Incorporated.

That said Wise tried to raise funds by means of said agreements whereby the claims of all of the creditors of said California corporations could be satisfied, but that it turned out that said patents and patent rights were not as valuable as was expected, and difficulties were encountered in marketing said patents and patent rights and articles that might be [16] manufactured and sold pursuant thereto, and that the project of forming said new company, to-wit, the said Delaware corporation, did not prove as successful as was expected. That in fact it is possible that large sums loaned to said California corporations by said Wise Patent and Development Company will never be repaid. That it is not true that the making of said agreements was not an advantage to said Wise Patent and Development Company and its creditors. That to raise the moneys loaned by said Wise Patent and Development Company to said California corporations required the pledging of those assets of said corporations which were not previously subject to deed of trust, and required the pledging of that stock in said Delaware corporation, the new company, which might otherwise have gone to said Wise or said California corporations, or said Wise Manufacturing Company, and that such stock and the right thereto remained subject to the pledge and lien referred to.

Respondent alleges that the petitioning creditors and all creditors of the respondent had notice of and knew for more than a year prior to the filing of the original petition herein of the agreements and transactions herein referred to.

Respondent alleges that it is not true that no consideration was ever received by the Wise Manufacturing Company for the transfer of said patents and patent rights, but the respondent alleges that the interests of said Wise Manufacturing Company in said property became and was represented by the agreements hereinbefore referred to. Respondent alleges that it is uncertain as to what can be realized out of said agreements for the purpose of satisfying the claims of those creditors of the respondent which have not been paid.

(3)

Respondent denies that said contracts or any contract as a valuable asset of the respondent corporation was or has [17] been secreted and/or concealed by respondent from the creditors of respondent corporation with intent to hinder, delay or defraud a creditor or creditors of said corporation.

On the contrary, respondent alleges that the petitioning creditors herein, if they were wanting in any information in regard to the transactions referred to were guilty, and each of them was guilty, of gross neglect and laches in making inquiry of officers and stockholders of said corporations and of each of them. That for over a year prior to the filing of the original petition in bankruptcy herein

the preferred stockholders whose stock was not purchased in connection with said contracts, had broadcasted complaints and charges relative to said three agreements, and the fact that their stock was not purchased under said agreements. These complaints were public property and were at all times known to the petitioning creditors and their attorneys. There was no concealment originally, but had there ever been it would have been immaterial because of what developed. That in truth and in fact, the plant which was operated by said corporations was shut down about two years before the original petition in insolvency was filed herein, and the petitioners and each of them, and all of the other creditors of respondent corporation knew of said fact when it occurred and knew more than a year before the original petition herein was filed, that the real property on which the plant of respondent corporation was located had been foreclosed upon by third persons, and that all of the machinery and equipment of respondent corporation had been foreclosed upon and sold.

That two of the creditors who filed the petition herein were judgment creditors, whose judgments were about two years old when the original petition in insolvency was filed herein, and that they were at all times in a position to have [18] the respondent corporation examined relative to its assets. That petitioners at all times had attorneys who were familiar with what was trying to be done under said three agreements and who were familiar with the extent to which the paying off of creditors occurred

and the extent to which stock was bought up before the original plan of said contracts failed of completion.

That said respondent corporation was never at any time called upon by its creditors to issue statements with respect to what had happened under said three agreements hereinbefore referred to, and that at any time and by the same inquiry by which the petitioners have their present knowledge, they could have ascertained all details connected with said three agreements. Respondent denies that the petitioners were or that either of them was totally unaware of the existence of said contract of February 27, 1930, and had no knowledge thereof until March 30, 1933. On the contrary, respondent corporation alleges that petitioners were, more than a year prior to the filing of the petition herein, aware of the facts hereinbefore alleged, and they were continuously and constantly put upon inquiry as to the said three agreements and the transactions connected therewith, and that there is no reason or excuse why if the said three petitioners were lacking in information as to the agreements or transactions hereinbefore referred to they did not obtain information and knowledge in regard thereto at least over a year prior to the filing of the petition.

(4)

As another further and separate defense to the alleged cause of action set out in Subdivision (a) of Paragraph V of said petition, respondent alleges that said cause of action is, by reason of the facts

herein alleged, barred by gross laches and neglect on the part of the petitioning creditors herein. [19]

(5)

As further and separate defenses to the acts of bankruptcy claimed to have been alleged in Subdivision (a) of Paragraph V of the amended petition, respondent corporation avers:

(a) No act of concealment of property therein referred to was committed within four months prior to the filing of the original petition herein.

(b) No act of concealment of property therein referred to continued to within four months of the filing of the original petition herein.

(c) No act of concealment of property therein referred to was committed within four months prior to the filing of the amended petition herein.

(d) No act of concealment of property therein referred to continued to within four months of the filing of the amended petition herein.

(e) No transfer or assignment of property therein referred to was made within four months prior to the filing of the original petition herein.

(f) No transfer or assignment of property therein referred to was made within four months prior to the filing of the amended petition herein.

(g) Every transfer of property therein referred to was recorded more than four months prior to the filing of the original petition herein.

(h) Every transfer of property therein referred to was recorded more than four months prior to the filing of the amended petition herein.

(i) Notorious, exclusive and continuous possession of whatever is alleged to have been transferred was taken by the [20] transferee more than four months prior to the filing of the original petition herein.

(j) Notorious, exclusive and continuous possession of whatever is alleged to have been transferred was taken by the transferee more than four months prior to the filing of the amended petition herein.

(k) The petitioning creditors had notice of each transfer referred to more than four months prior to the filing of the original petition herein.

(l) The petitioning creditors had notice of each transfer referred to more than four months prior to the filing of the amended petition herein.

(m) Each and every cause of action alleged in the petition is barred by the provisions of Subdivision (b) of Section 21, Chapter 3 of Title 11 of the United States Code.

(6)

Referring to the allegations of Subdivision (b) of Paragraph V of said petition, respondent admits that in June, July and August, 1931, it sold certain tools, machinery and equipment that belonged to respondent. That said sales were made to various persons and that the amount paid therefor was the sum of \$605.00. That there was no concealment

about the making of said sales. That as hereinbefore alleged, the plant of the respondent corporation had been sold, and its machinery and equipment, excepting that which was sold for \$605.00, had been foreclosed upon, and that the plant had been shut down. That the petitioners herein were persons who had performed services or loaned money to said Roy T. Wise for respondent corporation or who had furnished materials to respondent corporation, all in connection with the active operation of respondent corporation as a manufacturing concern, and that said petitioning creditors and all [21] of the creditors of respondent corporation knew of the closing down of the business of the respondent, of the shutting down of its plant, and that all of its assets had been disposed of in the manner in this answer alleged and that said facts were known to said petitioning creditors in the year 1931. That it is a fact that Roy T. Wise, who was the president of respondent corporation, caused the \$605.00 mentioned to be deposited in the name of H. Jacobson. That the purpose of said deposit was to make it possible for the said Roy T. Wise, president of said corporation, to distribute said moneys equally among creditors of said corporation, and so as to prevent any particular creditor from attaching said moneys and obtaining a preference thereby. That the deposit of said moneys in the name of H. Jacobson was not made for the purpose of concealment, nor were such moneys concealed with any intent to hinder, delay or defraud any creditor or creditors. That as is well known by the said petitioners said

moneys were in the year 1931 mostly withdrawn by the said H. Jacobson to pay herself wages which were due to her, and the balance of said moneys was paid out under the direction of said Roy T. Wise on a claim against respondent corporation for legal services, and that all of said acts occurred in the year 1931, and that it is not true in any sense that said deposit is an asset of said corporation. That as is well known to the petitioners the said deposit was wholly used up by said corporation in the year 1931. That in the year 1931 said respondent corporation was being pursued by various of its creditors who had not been paid through the loan hereinbefore mentioned, and it was the hope and expectation of the said Roy T. Wise that said funds could be used in meeting claims of creditors but without preferring a particular creditor. That said deposit was not made with a view to hinder, delay or defraud any creditor or creditors, but said deposit was made [22] for the purpose of avoiding the preferring of any particular creditor of respondent corporation. Respondent denies that said deposit was or has been concealed or secreted by the said Roy T. Wise. Respondent denies that said petitioners were totally unaware or unaware at all of the sale of the tools, machinery and equipment referred to in Subdivision (b) of Paragraph V of the petition, but said petitioners and all the other creditors of the respondent corporation knew that its plant and all of its tools, machinery and equipment had been sold off and disposed of. That the petitioning creditors and said other creditors knew

this before the end of the year 1931, and that it is not true that they had no knowledge thereof until April 27, 1933.

(7)

That there is no reason or excuse for the failure of the petitioning creditors to make inquiry relative to the assets of respondent corporation. That by reason of all of the facts hereinbefore alleged the petitioning creditors are barred by their gross laches and neglect to prosecute the petition herein, and that it would be inequitable and unfair to permit the petitioning creditors to make use of the powers of this Court as a Court of bankruptcy in an effort to collect the demands due to them. That no facts exist which justify this bankruptcy proceeding, and that the petitioners have no right on account of anything alleged in the petition to be put in charge of or in control of the respondent corporation.

(8)

As further and separate defenses to the acts of bankruptcy claimed to have been alleged in Subdivision (a) of Paragraph V of the amended petition, respondent corporation avers: [23]

(a) No act of concealment of property therein referred to was committed within four months prior to the filing of the original petition herein.

(b) No act of concealment of property therein referred to continued to within four months of the filing of the original petition herein.

(c) No act of concealment of property therein referred to was committed within four months prior to the filing of the amended petition herein.

(d) No act of concealment of property therein referred to continued to within four months of the filing of the amended petition herein.

(e) No transfer or assignment of property therein referred to was made within four months prior to the filing of the original petition herein.

(f) No transfer or assignment of property therein referred to was made within four months prior to the filing of the amended petition herein.

(g) Notorious, exclusive and continuous possession of whatever is alleged to have been transferred was taken by the transferee more than four months prior to the filing of the original petition herein.

(h) Notorious, exclusive and continuous possession of whatever is alleged to have been transferred was taken by the transferee more than four months prior to the filing of the amended petition herein.

(i) The petitioning creditors had notice of each transfer referred to more than four months prior to the filing of the original petition herein.

(j) The petitioning creditors had notice of each transfer referred to more than four months prior to the filing [24] of the amended petition herein.

(k) Each and every cause of action alleged in the petition is barred by the provisions of Sub-

division (b) of Section 21, Chapter 3 of Title 11 of the United States Code.

WHEREFORE respondent prays that petitioners take nothing by their petition, and that it have and recover its costs.

Dated, November 10, 1933.

CLARK, NICHOLS & ELTSE,
GEORGE CLARK,

Attorneys for Respondent. [25]

STATE OF CALIFORNIA,
County of Alameda.—ss.

George Clark, being first duly sworn, deposes and says: That he is attorney for Wise Manufacturing Company, the respondent named in the within answer. That he has heard read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge, except as to matters therein stated upon his information or belief, and as to such matters he believes the same to be true. That affiant is authorized to and does make this affidavit on behalf of respondent corporation, because the presence of the officers of the said corporation who are familiar with the facts cannot be obtained, and particularly Roy T. Wise, who had charge of all of the matters referred to in the answer is absent from the State of California, and the said Roy T. Wise is president of the respondent corporation.

GEORGE CLARK.

Subscribed and sworn to before me this 10th day of November, 1933.

[Seal]

VIRGINIA NELSON,
Notary Public, in and for the County of
Alameda, State of California.

[Endorsed]: Filed Nov. 13, 1933, 9:10 A. M.
Walter B. Maling, Clerk, by C. M. Taylor, Deputy
Clerk. [26]

[Title of Court and Cause.]

ORDER OF ADJUDICATION.

At San Francisco, in said District, on the 29 day of May, 1934, before the said Court in Bankruptcy, the petition of E. W. Olin, Ralph Sites and Berkeley Pattern Works that Wise Manufacturing Company, a corporation be adjudged bankrupt within the true intent and meaning of the Acts of Congress relating to Bankruptcy, having been heard and duly considered, and it appearing to the Court that service of said petition with a writ of subpoena has been duly served on the alleged bankrupt and that the said alleged bankrupt has filed his answer thereto; and the issues raised have been duly tried and submitted and an order entered on April 6th, 1934, adjudging respondent bankrupt upon findings of fact and conclusions of law;

IT IS HEREBY ORDERED that said Wise Manufacturing Company, a corporation, be and is hereby declared and adjudged bankrupt accordingly.

It is thereupon ordered that said matter be referred to Burton J. Wyman, one of the referees in bankruptcy of this Court, to take such further proceedings therein as are required by said Acts; and that the said Wise Manufacturing Company, a corporation shall attend before said referee on the 8th day of June, 1934 at his office in Oakland, California, at 10 o'clock forenoon, and thenceforth shall submit to such orders as may be made by said referee or by this Court relating to said matter in bankruptcy.

It is further ordered that all notices required to be published in the above-entitled matter, and all orders which [27] the Court may direct to be published, be inserted in the "Inter-City Express", a newspaper published in the County of Alameda, State of California, within the territorial district of this Court, and in the county within which said bankrupt reside.

Dated, May 29, 1934.

A. F. ST. SURE,
District Judge.

[Endorsed]: Filed May 29, 1934, 9:41 A. M.
Walter B. Maling, Clerk. [28]

In the United States District Court for the
Northern District of California, Southern Division.

In Bankruptcy.

No. 23,049-S

In the Matter of

WISE MANUFACTURING COMPANY

(a corporation),

Respondent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

The above entitled cause and proceeding came on regularly for trial on the 4th, 5th and 6th days of April, 1934, before the above entitled Court, the Honorable A. F. St. Sure presiding; Messrs. Resleure, Vivell & Pinckney, Eugene R. Elerding, Esq., and F. B. Cerini, Esq., appeared as counsel for petitioning creditors, E. W. Olin, Ralph Sites and Berkeley Pattern Works; Messrs. Clark, Nichols and Eltse, appeared as counsel for respondent; and thereupon evidence both oral and documentary was offered by the respective parties and the matter being orally argued, was submitted to the above entitled Court for decision; and the Court having fully considered all the evidence in the case, makes its findings of fact and conclusions of law, as follows:

FINDINGS OF FACT.

I.

That the petitioners and each of them are residents of the Southern Division of the United States

District Court for the Northern District of California.

II.

That respondent, Wise Manufacturing Company is and at all [29] times mentioned in the petition, was a corporation duly organized under the laws of the State of California, with its principal place of business in the City of Berkeley, County of Alameda, State of California, and that respondent at all of said times prior to the 1st day of May, 1931, was duly authorized to do business in said state and was engaged in the manufacturing, selling and distribution of tools, dies, equipment and patented articles; that on said 1st day of May, 1931, the charter of said respondent was suspended for non-payment of taxes, and said respondent ceased to be authorized to do business in said state on said day, month and year.

III.

That respondent owes debts to the amount of \$1000.00, or over, and is now and at all the times mentioned herein was insolvent and that said respondent is not a wage earner, nor a person engaged principally in farming or the tilling of the soil and is not a municipal, railroad, insurance or banking corporation.

IV.

That petitioners are creditors of respondent who have provable claims against respondent, which

amount in the aggregate, in excess of the value of securities held by them, to \$500.00 or over; that the nature and amount of the claims of each of said petitioners are as follows:

Petitioner E. W. Olin has a provable claim against respondent of \$239.34, the same being for the balance due and owing upon a judgment rendered against the said respondent, in favor of said petitioner E. W. Olin; that petitioner Ralph Sites has a provable claim against respondent in the sum of \$1029.96, of which \$450.00 is for the balance due and owing upon a promissory note made by said respondent in favor of petitioner Ralph Sites, of which the sum of \$483.96 is for the balance due and owing upon a judgment rendered [30] against respondent, in favor of petitioner Ralph Sites, and of which \$96.00 is for work and labor done and performed for and at the request of respondent; that petitioner Berkeley Pattern Works has a provable claim against said respondent in the sum of \$183.50, the same being for work and labor done and for goods sold and delivered for and at the request of the said respondent.

V.

That within four months next preceding the date of the filing of the original petitioner here, and within four months next preceding the date of the filing of the amended petition herein, respondent committed acts of bankruptcy, as follows:

(a) That on and prior to the month of September, 1929, and at all times since said date, Roy

T. Wise has been and is the President of respondent corporation and the owner and holder of a majority of its capital stock; that on or about the month of May, 1930, said Roy T. Wise, acquired all of the outstanding common stock of said corporation and is, and ever since said time, has been, to all intents and purposes, the Wise Manufacturing Company; that on or about said month of September, 1929, said Roy T. Wise was authorized and directed by said corporation to negotiate for certain loans to the corporation to assist it in carrying on its business and to liquidate the claims of its then outstanding creditors; that in connection with the efforts of said Roy T. Wise to obtain loans in behalf of respondent, he contacted one Will H. Hays, who in turn introduced the said Roy T. Wise to one Ambrose N. Diehl; that thereupon the said Will H. Hays, Ambrose N. Diehl, and Roy T. Wise entered into negotiations with Westinghouse Electric Manufacturing Company of Pittsburg, Pennsylvania, and as a result of said negotiations obtained an offer of \$100,000.00 for the exclusive use of certain patents belonging to respondent, by said Westinghouse Electric Manufacturing Company, for the [31] period of one year, in the eastern states of the United States of America and in Canada; that as an additional consideration for said exclusive use, said Westinghouse Electric Manufacturing Company proposed to pay certain royalties upon each and every article manufactured by said Westinghouse Electric Manufacturing Company under the aforesaid patents; that said Westinghouse Electric

Manufacturing Company, in contemplation of the use by it of said patents, expended large sums of money in altering and adapting its plant for the manufacture of articles under said patents, that said expenditures included a salary of \$1000.00 per month to said Roy T. Wise for services in connection with said changes in said plant and in perfecting said patents; that thereupon, to-wit, on or about the 27th day of February, 1930, and with full knowledge of the said offer of Westinghouse Electric Manufacturing Company for the use of said patent and with full knowledge of the value thereof as reflected by said offer for said exclusive use, and otherwise, said Will H. Hays, Ambrose N. Diehl and Roy T. Wise, entered into a certain contract in writing, whereby and wherein it was recited that Roy T. Wise controlled respondent corporation and would cause respondent to transfer and assign to Wise Patent and Development Company, a corporation to be organized under the laws of the State of Delaware by the said Will H. Hays, Ambrose N. Diehl and Roy T. Wise, all of its right, title and interest to certain United States Patents, covering and connected with the Wise Multispeed Transmission, for the sum of \$75,000.00, to be paid to the respondent from surplus accumulating over the expenses of operating such proposed Wise Patent & Development Company, at such time as funds should be available; that the said contract further provided that the said Roy T. Wise should proceed to acquire by purchase, all of the outstanding capital stock of respondent, other than the

stock theretofore issued to the said Roy T. Wise, and in [32] effecting such purchase, might use funds from the aforesaid sum of \$75,000.00. That thereafter the said corporation, Wise Patent and Development Company, was duly formed under the laws of the State of Delaware and its capital stock issued substantially in its entirety to said Will H. Hays, Ambrose N. Diehl and Roy T. Wise; that thereafter pursuant to the provisions of said contract, the aforesaid patents were transferred to said Wise Patent & Development Company, which in turn entered into a certain contract or contracts with Westinghouse Electric Manufacturing Company, for the use of said patents and received in consideration therefor, certain sums of money by way of cash and loans and other valuable considerations; that subsequent to the assignment of the said patents by respondent to the Wise Patent & Development Company, the consideration provided therefor in said contract was modified by two later contracts, entered into between said parties on May 8, 1930, and September 1, 1930, respectively, which provided for certain contingent payments to respondent, no part of which has been received by respondent.

That the said contract of February 27th, 1930, together with the two later modifying contracts, and all rights of respondent flowing from or pertaining to them or any of them, were assets of respondent.

That the said contract of February 27th, 1930, and all of the transactions arising therefrom and in

connection therewith, whereby said respondent and said Will H. Hays, Ambrose M. Diehl and Roy T. Wise, had acquired without adequate or any consideration were by respondent and said parties concealed from the creditors of said corporation and from its stockholders, other than Roy T. Wise; that to effectuate said concealments said respondent and said Will H. Hays, Ambrose M. Diehl and Roy T. Wise, falsely represented to said creditors and stockholders, that the said [33] patents had been disposed of for the sum of \$25,000.00; that in addition to the concealment of said contract and the transactions arising therefrom and in connection therewith, said respondent and said Will H. Hays, Ambrose N. Diehl and Roy T. Wise, further concealed from said shareholders and said creditors of respondent, any possible causes of action against Will H. Hays and/or Ambrose N. Diehl and/or Roy T. Wise, and/or against Wise Patent and Development Company arising out of said contract and/or for the setting aside of said assignment of said patents to Wise Patent and Development Company and/or for damages resulting from the fraudulent acts of said parties, Will H. Hays, Ambrose N. Diehl and Roy T. Wise, in acquiring and converting to their own use, the assets of respondent without adequate or any consideration therefor.

(b) That the said respondent through its president, Roy T. Wise, during the months of June, July and August, 1931, caused to be sold and did sell certain tools, machinery and equipment belonging

to said respondent to persons unknown; that respondent received the approximate sum of six hundred twelve (\$612.00) dollars, from said sales; that said sum of six hundred twelve (\$612.00) dollars was an asset of respondent, which on or about the month of August, 1931, was concealed by respondent depositing the same in the West Berkeley Branch of the Bank of America, Berkeley, California, in the name of one H. Jacobson, an employee of respondent.

That all of the aforesaid acts of concealment of assets of the respondent, continued from the time of their original commission up to within four (4) months of the filing of the original and amended petitions herein, and the original and amended petitions herein were filed within four months from the discovery of the above mentioned acts of concealment of assets by respondent.

That the aforesaid assets of respondent were concealed [34] as aforesaid with the intent to hinder, delay and defraud the creditors of respondent.

VI.

That respondent is not now engaged in business and has failed and refused to pay any of its creditors.

VII.

The Court further finds that this entire case and the transactions above set forth, on the part of said respondent, and said Will H. Hays, Ambrose N. Diehl and Roy T. Wise, are tainted with fraud and

concealment and warrant a full and complete investigation through the processes of the Bankruptcy Court.

VIII.

The Court further finds that all allegations of the respondent's answer herein, inconsistent with the foregoing findings of fact, are untrue.

CONCLUSIONS OF LAW.

Wherefore the Court concludes as a matter of law from the foregoing facts, that respondent Wise Manufacturing Company should be declared and adjudged a bankrupt within the true intent and meaning of the acts of Congress relating to bankruptcy.

Let an adjudication be entered accordingly.

Dated, May 24, 1934.

A. F. ST. SURE,

Judge of the U. S. District Court.

[Endorsed]: Filed May 25, 1934, 11:33 A. M.
Walter B. Maling, Clerk. [35]

[Title of Court and Cause.]

NARRATIVE STATEMENT OF EVIDENCE.

The following is a narrative statement of the evidence taken on the trial of the above entitled cause, which trial occurred on April 4th, 5th, and 6th, 1934.

Mr. Resleure, one of petitioners' attorneys, presented the evidence and examined the witnesses on behalf of the petitioners and Mr. Clark, one of respondent's attorneys, presented the evidence and examined the witnesses on behalf of respondent.

At the opening of the case Mr. Resleure asked Mr. Clark whether Mr. Wise would be present as he desired to examine him under section 2055 of the Code of Civil Procedure and Mr. Clark stated that Mr. Wise was not present.

Thereupon,

F. W. PETERS

was called and sworn as a witness for petitioners and he testified on his direct examination as follows:

"I am an attorney at law, practicing in San Francisco. I became attorney for Professor Franklin Palm, of the University of California, in October, 1932. He had \$1500.00 in preferred stock of the Standard Die & Tool Company. I [36] never previously heard of the case which he had instituted in this Court, before my employment. I had been doing some business with Dr. Palm at the University, and he told me that he had had an attorney for over a year, and that he had been trying to get some action. That he had filed a complaint, and that no service had been made on that and that the attorney had filed a waiver of right to take judgment by default against the defendants. He asked me to investigate the case and report back to the preferred stockholders."

(Testimony of F. W. Peters.)

"I was employed by the holders of practically all of the preferred stock of the Standard Die & Tool Company that was still outstanding. I represented Mr. Palm, Mr. Harriman, Mr. McMahon, four members of the Christensen family, and one or two others. They held \$11,500.00 worth of stock. The total issue of the preferred stock was \$30,000.00. I, acting for them, interviewed Mr. Wise at his home in Berkeley at least twice a week for close to several months, extending from the latter part of November, 1932, through about April or May of 1933. Mr. Wise told me this in these talks extending from a period in November, 1932, until about May, 1933. I had gone down to Mr. Wise's home on an average of twice a week during that period and interviewed Mr. and Mrs. Wise. I filed a substitution of attorneys in the Palm case on February 2, 1933, which was some three or four months after I became acquainted with the case.

Mr. Clark here interposed an objection to the witness' testifying as to the conversations occurring at the meetings referred to, on the ground that it was an attempt to establish corporate concealment in the years 1932, 1933, and no proper foundation had been laid for the purpose of showing that the people with whom the witness talked represented [37] the respondent or had authority to speak for the respondent. That there was no proper foundation laid for the testimony of the witness as to what Mr. Wise said or as to what Mrs. Wise said. As a

part of the basis for the objection the respondent offered the certificate of the Secretary of State, which was admitted in evidence as Respondent's Exhibit No. 1. This certificate recited that the right of the respondent to do business in the State of California was suspended on May 1, 1931, for a failure to pay its corporation franchise taxes, and that the suspension was still in force. The certificate was dated April 3, 1934, and signed and sealed by the Secretary of State. The Court then stated that the objection was good as to the foundation not being laid and the witness proceeded: Mr. Wise was president of Wise Manufacturing Company and also a majority stockholder of both corporations and was in fact the dominating personality of both corporations.

“Mr. Clark then renewed his objection on the ground that the witness was not a stockholder and stated that Mr. Wise had but a few shares of stock in the Wise Manufacturing Company. About 4600 shares in the Wise Manufacturing Company was held by the Standard Die and Tool Company and that Mr. Wise did have a majority of stock in the Standard Die and Tool Company. The witness then proceeded:

“Mr. Wise was president of the Wise Manufacturing Company; Mrs. Wise was the vice-president and the secretary also, and that he knew that from the minutes which he had read. The Court then overruled the objection.”

(Testimony of F. W. Peters.)

The WITNESS (proceeded).—"I recognize the document dated December 26, 1930, entitled 'Stockholders Approval of Assignment of Patent and Patent Applications', which Mr. Wise delivered to me and which he stated was the stockholders' approval of assignment of patents. It came from the minute [38] books of the two companies, the Standard Die & Tool Company and the Wise Manufacturing Company. I received it in April, 1933." "Mr. Wise had three executed copies of this document in the books, two of them were duplicates and one of them, I believe, was an original, and I asked Mr. Wise if I might have a copy of it, and he said I might. He gave me this copy."

The document was here admitted as

Petitioners' Exhibit No. 1,

and is as follows:

STOCKHOLDERS' APPROVAL OF ASSIGNMENT OF PATENTS AND PATENT APPLICATIONS.

We the undersigned, being all the stockholders in the Wise Manufacturing Company, a corporation, duly organized under the laws of the State of California, do hereby ratify, confirm and approve the transfer, conveyance and assignment of any and all the patents, interests in patents, patent applications and patent rights heretofore made by the Wise Manufacturing Company and/or the officers of said corporation to Roy T. Wise and/or the Wise Patent

(Testimony of F. W. Peters.)

and Development Company of every kind and nature whatsoever, this ratification, confirmation and consent being irrevocable and in no way dependent upon any condition or conditions whatsoever.

Hereby fully approving the vesting of complete and unconditional title in the Wise Patent and Development Company of all patents, patent applications, patent rights and inventions in the United States of America and elsewhere incident to transmissions, multi-speed-transmissions, clutches, constant mesh, gear transmissions or otherwise, to the extent of any ownership of any legal or equitable interests which the undersigned or any of us have therein.

Dated this 26th day of December, 1930.

STANDARD DIE AND
TOOL COMPANY, INC.
By ROY T. WISE, Pres.
PANSY WISE,
Stockholders.

The WITNESS (continued).—"Mr. Wise explained at that time that the signers of that document constituted all the stockholders of the Wise Manufacturing Company and the directors, and that Mr. Wise was president and a director of both companies, and that [39] Mrs. Wise was a director of both companies. In this period in November, 1932, and for the next three or four months I discussed

(Testimony of F. W. Peters.)

with Mr. Wise his activities in connection with the Hays and Wise deal, in connection with the transfer of the patents to the Patent Development Company.”

At this point Mr. Clark renewed the objection to calling for conversations with Roy T. Wise on the ground that the corporation's right to do business was suspended; that the right of Wise to speak for the corporation or to perform any corporate act in the matter of concealment was not authorized and could not have been authorized because of the suspension; that according to the theory of counsel on the other side he was endeavoring to charge Roy T. Wise with appropriation of the patents, the president of the corporation, and that if that was the theory upon which this proceeding was going forward, that Roy T. Wise was wrongfully appropriating the assets of the company, and Wise could not commit an act of concealment for the company, in so far as the corporation was concerned, in his dealings with any of the creditors. The Court overruled this objection, and the respondent excepted.

The WITNESS (continued).—“Mrs. Wise was present at quite a few of the conversations which I had with Mr. Wise. His daughter, Rowena Wise, was also present, and Mr. Cerini, an attorney rep-

(Testimony of F. W. Peters.)

resenting the creditors, was also present at several of the conversations.”

Mr. Resleure here produced Resolution No. 23 of the directors of the Wise Manufacturing Company, and the witness testified:

“Mr. Wise showed me the copy of that resolution which was in the minutes. He showed me all the resolutions and all the minutes and all of the books of the company. Mr. Wise loaned me the books of the company for a matter [40] of almost two weeks, and I examined them very thoroughly.”

The resolution was here admitted in evidence as
Petitioners' Exhibit No. 2,
and in substance it read as follows:

The resolution recited that it was resolved by the directors of the Wise Manufacturing Company that it should, together with Standard Die & Tool Company, Incorporated, borrow \$25,000.00, and subsequently additional sums up to \$75,000.00 from Alonzo C. Owens, and any other persons and corporations, and execute a note or notes to evidence the loan and secure the same with a deed of trust or mortgage, real or chattel, and with such other security as the lender or lenders might require for the purpose of retiring and paying the indebtedness of the company and providing funds for its operation, and that the president and secretary be

authorized to obtain the loan for the purposes aforesaid, and that they be authorized to execute the note and security instruments aforesaid, the rate of interest to be paid not to exceed 6%, and that the money derived from the loan should be used for the purposes stated, and that the secretary of the company be directed to deliver to the lender a certified copy of the resolution, with corporate seal attached to the resolution. Attached to the resolution was the secretary's certificate, signed by the secretary, E. W. Olin, reciting that he was the secretary of the Wise Manufacturing Company, and that the resolution was a full, true, and correct copy of the resolution of the Board of Directors of the Company, which was regularly adopted on May 26, 1930.

At this point, Mr. Resleure asked the witness as to whether Mr. Wise showed him the contract of February 27, 1930, mentioned in the amended petition, and Mr. Clark renewed his objection to testimony of the witness as to the statements and conduct of Wise on the ground that his declarations could not be binding on the respondent, and that it was obvious that the testimony related to the latter part of the year 1932 and the beginning of the year 1933. The Court again overruled the objection, the respondent noting an exception.

Mr. Resleure then produced a photostatic copy of the contract of February 27, 1930, mentioned in

the amended petition and this was admitted in evidence as the

Petitioners' Exhibit No. 3.

It read, as follows:

THIS AGREEMENT, made and entered into this 27th day of February, 1930, by and between Roy T. Wise, of Berkeley, California, party of the first part, and [41] Ambrose N. Diehl of Pittsburgh, Pennsylvania, and Will H. Hays of Sullivan, Indiana, parties of the second part, witnesses that:

WHEREAS, the party of the first part has invented and has patents issued and pending on certain useful devices specifically for the object of applying various transmission speeds to Induction Motors and has other patents relating to this form of apparatus pending and has designed apparatus for the carrying out of the above said change of speed of transmissions and has already marketed some of these machines to purchasers, such patents and applications including the following, to-wit:

	Serial No.
Wise Application Three-Speed Transmission	283,249
Filed June 6, 1928	
Issued into Patent No. 1,745,075	
Wise Constant Mesh Gear Transmission Clutch	378,862
Filed July 17, 1929	
Wise Constant Mesh Transmission for Electric Motors	380,634
Filed July 24, 1929	

	Serial No.
Wise Transmission Clutch Filed August 1, 1928	296,659
Wise Constant Mesh Gear Electric Motor Transmission Filed June 6, 1928	283,248
Wise Two-Speed Transmission Filed June 6, 1928	283,247
Wasbauer Application Three-Speed Con- stant Mesh Gear Electric Motor Trans- mission Filed January 4, 1928	244,434

and,

WHEREAS, said party of the first part has been instrumental in the organization of the Standard Die and Tool Company, Incorporated, and the Wise Manufacturing Company, both California corporations, and has caused such action to be taken as that there is now lodged in said Wise Manufacturing Company rights and interests in all of the patents and applications above referred to, and, [42]

WHEREAS, the party of the first part owns or controls Six Hundred Sixty (660) shares of the Common Stock and Five (5) shares of the Preferred Stock of the Standard Die and Tool Company, Incorporated, with Thirty-four (34) shares of the Common Stock and Two Hundred Fifty-eight (258) shares of the Preferred Stock of said Standard Die and Tool Company, Incorporated, owned by others, being all of the Common and

Preferred Stock of said Standard Die and Tool Company, Incorporated, which is issued and,

WHEREAS, the Standard Die and Tool Company, Incorporated, is the owner of Four Thousand Six Hundred Seventy (4,670) shares of Common Stock of the Wise Manufacturing Company with Two Hundred Sixteen (216) shares of said Common Stock owned by others, and Fifty-five (55) shares of said Common Stock subscribed for by others, being all of the stock of the said Wise Manufacturing Company issued or outstanding except Two Hundred Sixteen (216) shares of Common Stock issued in escrow to be the property of the Wise Manufacturing Company under certain conditions, and,

WHEREAS, said party of the first part believes it to the best interests of the said Wise Manufacturing Company for said Wise Manufacturing Company to sell all of its rights and interests in all of the patents, applications and rights above referred to and the best interest of all the stockholders of said companies so to do in order that said Wise Manufacturing Company may devote its activities to its tool and other businesses than that resulting from said patents and applications above referred to, and

WHEREAS, said party of the first part has approached the parties of the second part for the purposes of such assistance as they may be able to render in the promotion [43] of said patents and applications and the activities incident thereto and

has asked said parties of the second part to become stockholders in a company to be organized to acquire said patents, applications and rights and for all of the purposes above outlined, and said parties of the second part have agreed so to do and have actively engaged in such requested action, and

WHEREAS, certain expenditures have been made by the party of the first part, and the said Wise Manufacturing Company in the design, manufacture and marketing of such apparatus to the extent of approximately Fifty Thousand Dollars (\$50,000.00), and

WHEREAS, the party of the first part controls and can cause any purpose herein agreed to to be executed by the said Wise Manufacturing Company and the Standard Die and Tool Company, Incorporated;

Now, in consideration of the mutuality hereof and the sum of One Dollar (\$1.00) each to the other paid and for other valuable and sufficient considerations, the receipt of all of which is hereby acknowledged, it is agreed by and between the parties hereto as follows:

1. That a corporation shall be organized to be called the Wise Patent and Development Company, by charter issued by the State of Delaware, for the purpose of holding all of the above mentioned patents and applications and all the supplementary patents for the specific piece of apparatus above described and for the purpose of investigating, holding, developing and promoting this as

well as other patents of merit which may be accepted by the said company, either by purchase, invention, or on a royalty or other basis, including specifically the patents [44] already issued to the party of the first part for the Wise Multi-Speed Transmission and all applications for patents pending relative thereto;

2. That the capital stock of the said corporation shall consist of Twelve Hundred (1200) shares of no par value Common Stock, Three Hundred Thirty-three and One-third ($333\frac{1}{3}$) shares of which shall be issued to the party of the first part, Six Hundred Sixty-six and Two-thirds ($666\frac{2}{3}$) shares to the parties of the second part on the basis of Three Hundred Thirty-three and One-third ($333\frac{1}{3}$) shares to each of said parties of the second part; and Two Hundred (200) shares shall be left in the treasury for such purposes as may be decided upon by the Board of Directors of said Company; provided, however, that One Hundred (100) shares of the said Two Hundred (200) shares shall be issued to the party of the first part at the time of the issuance of the One Thousand (1,000) shares above referred to, which said One Hundred (100) shares is to be used by the party of the first part in the complete discharge and release of the said party of the first part and said patents, applications and rights from any and all claims, if any, against said party of the first part or his assignees or the said Wise Patent and Development Company or the Standard Die and Tool Company, Incorporated, or the Wise Manufactur-

ing Company by B. K. Gillespie of Los Angeles, California, and Owen B. Smith of Oakland, California, or either of them; provided, however, that such One Hundred (100) shares so to be issued for such purpose to the party of the first part shall be so used by him as that the voting right in said One Hundred (100) shares remains in the party of the first part and the parties of the second part all jointly for a period of two (2) years from [45] the date of issue; it being understood that while there is no legal claim against the party of the first part by said B. K. Gillespie and said Owen B. Smith, the party of the first part desires to reward them for certain services heretofore rendered by them in indirect relation to this transaction. It is understood that all of such stock shall be issued fully paid up and non-assessable in exchange for such assignments of such patents, applications and rights, all as herein provided for, which said party of the first part herein undertakes to cause to be so assigned;

3. The By-Laws of the Company shall provide for a President, Vice-President, Secretary and Treasurer and a Board of Directors of five (5) members, including the executive officers;

4. The party of the first part agrees to assign or cause to be assigned to said company when organized all of the patents and applications for patents above described and all rights and interest in all patents pending covering or connected with said Wise Multi-Speed Transmission and any pat-

ents for any improvements of said apparatus which may be later by him devised; said party of the first part representing that such patents and applications are either now owned by him or by the said companies which he controls and whose execution of the commitments herein made by him he can require;

5. The parties of the second part shall advance all expenses necessarily incurred in the organization and incorporation of said company, and in addition shall advance into the treasury of the said company an amount necessary to enable said company to refund to the party of the first part forthwith the sum of Six Hundred Fifty Dollars (\$640.00) in cash involved in some incidental [46] immediate personal expenses and to enable said company to proceed immediately with an investigation of said patents to the satisfaction of the said company and the parties of the second part;

6. It is understood that such company's powers shall include the right to own patents and sell the same outright; to retain the right to manufacture exclusively; to grant licenses for fixed fees or on a royalty basis or on a combination of the above; for the manufacture under such patents as are owned or controlled by it, and that all fees from such sale, manufacture or licenses shall go directly into the company's treasury; and that such company shall have such other rights usually appertaining to such type of corporations;

7. It is further agreed by the parties hereto after such patents and rights are vested in said

company, all as herein provided for, that such company shall further endeavor to develop by license, sale or otherwise the said device known as the Wise Multi-Speed Transmission, with all improvements thereon, and shall further proceed so to develop, market and license any other patents of merit which may be accepted by it to the best of its ability and from the proceeds received by the said company for such activity cash payments up to the sum of seventy-five thousand dollars (\$75,000.00) shall be made to the Wise Manufacturing Company from surplus accumulating over the expense of operating such proposed Wise Patent and Development Company at such times as funds are available; such payment of such sums up to said seventy-five thousand dollars (\$75,000.00) to be by way of reimbursement to the party of the first part and the California companies above mentioned which he controls for expenditures to date in connection with the de-[47] velopment of the patents, together with substantial addition. It is understood that neither the physical properties nor any of the capital stock of the Wise Manufacturing Company are to be transferred at this time to the Wise Patent and Development Company as any part of the transaction;

8. After the said sum of seventy-five thousand dollars (\$75,000.00) is paid to the Wise Manufacturing Company, then all monies received by the Wise Patent and Development Company shall be the property of the stockholders on the basis of the stock ownership above set out, also on the dissolution or sale of the company the funds remaining

after all debts are paid shall be distributed on the above mentioned basis.

9. The party of the first part agrees to proceed immediately to secure ninety (90) days' option on all of the preferred and common stock issued and outstanding in the Standard Die and Tool Company, Incorporated, other than that already issued to him and to proceed immediately to take ninety (90) days' options on all of the capital stock of the Wise Manufacturing Company other than that already issued to him; the purpose of the party of the first part in such action being so to acquire such control of all such stock in order to have entire ownership of the Wise Manufacturing Company at the time the assignments of the patents and applications referred to herein are to be made to the Wise Patent and Development Company by the party of the first part or by the Wise Manufacturing Company or otherwise. This is all to the end that the party of the first part shall be one hundred per cent (100%) owners of the Wise Manufacturing Company and consequently in complete control of all of its patents, applications, rights and other assets [48] and will thereby be in position completely to effect all of the assignments and transfers contemplated by the provisions of this agreement, which assignments in Article 4 above he specifically agrees to execute. The consideration for such assignments of all of such patents, applications and rights by the party of the first part, the Wise Manufacturing Company or otherwise, shall be the seventy-five thousand dollars (\$75,000.00) referred to in

Article 7 above and the issuance of all or any part of the stock as the parties of the second part may elect to the party of the first part or to the Wise Manufacturing Company, with the understanding that re-assignments of such stock of the Wise Patent and Development Company will be made as that the ownership of such stock shall be as outlined in Article 2 above. It is understood that the party of the first part in so developing the one hundred per cent (100%) ownership in the Standard Die and Tool Company, Incorporated, and the Wise Manufacturing Company and exercising such options to purchase stock therein may use funds from the seventy-five thousand dollars (\$75,000.00) mentioned in Article 7 above. It is understood by all of the parties hereto that such options so taken by the party of the first part of the stock in such California companies are not to be exercised by the party of the first part until directed so to do by the parties of the second part. It is further understood that the parties of the second part are hereby only obligating themselves to the extent of advancing funds to the proposed Wise Patent and Development Company for the purposes set out in Article 5 above, and that such further obligations indicated herein are at the option of the parties of the second part after such investigation of said patents and other investigation as they see fit to [49] make has been concluded to their satisfaction.

IN WITNESS WHEREOF, the parties hereto have set their hands and affixed their seals and ex-

(Testimony of F. W. Peters.)

cutted this instrument in triplicate the day and year first above written.

[Seal]

ROY T. WISE,

[Seal]

WILL H. HAYS,

[Seal]

AMBROSE N. DIEHL.

The WITNESS proceeded:

“At one of their first meetings Mr. Wise showed him a list of creditors who had been paid and told him he had received \$25,000 for the patent.”

Mr. Clark renewed his objections and stated that his objections went to all of this on the ground that Mr. Wise could not at this date be representing a corporation, and requested the Court to note the fact that counsel for the other side had designated Mr. Wise as one of the “unholy three”, and that Mr. Clark supposed that counsel for the other side’s contention was that Mr. Wise was engaged in stealing these patents from the company. That, if that be true, Mr. Wise certainly did not commit an act of concealment under the authority of the board of directors and the stockholders of that company in the process of taking that particular property. The Court overruled the objection, the respondent excepting.

(Testimony of F. W. Peters.)

The WITNESS continued:

“Mr. Wise told me that he had received \$25,000.00 for the sale of the patents to the Wise Patent and Development Company of Delaware. That was only told me after about three months of conversation with Mr. Wise and my trying to ascertain what had happened to the patents, who held them and what had been received for them as consideration. The Wise Patent and Development Company was the [50] corporation that was formed in the east by Mr. Hays, Mr. Wise and Mr. Diehl. After about three months I had all my notes together, and I had a complete picture of the entire deal, and I went down to Mr. Wise’s home one evening, and told him—well, I asked him what had become of the patents, who held them at that time, and what had been received for them. This was the first time he ever mentioned it. He brought out this contract of February 27, 1930, and he told me that he and Mr. Diehl and Mr. Hays had entered into the contract in New York on that day and that no one had ever seen that contract outside of those three persons, and that he would be willing to let me look it over with the understanding that I would not disclose the contents of the contract to anyone. I told him I could not do that, but that I would not disclose it any more than would be necessary to make my report. He told me that Mr. Hays had at that time all of his personal stock pledged for various notes, and that Mr. Hays and Mr. Diehl would be exceedingly angry if they ever learned

(Testimony of F. W. Peters.)

that he had shown me this contract. He asked me not to show the contract to anyone; there was no difference as to showing it to creditors. There were no exceptions. The way it came about that he showed me this document although I represented preferred stockholders was that I had been going down there and getting the story and seeing the various creditors and stockholders, and I had gotten in touch with various directors of both corporations, and I had a pretty fair picture in my own mind of what had happened, and the only thing I could not find was the consideration for the transfer of the patents, and I told Mr. Wise that there was absolutely no consideration received by the Wise Manufacturing Company for the transfer, and he said, 'Yes, there was consideration received' and that he had this contract which he had entered into in the east, and that that was consideration for the patents, and then he [51] told me of the escrow which was handled through the Bank of America. I did not receive this contract dated February 27, 1930, until February 23rd, 1933, about three months after I first contacted Mr. Wise.

I know when the petitioning creditors first became acquainted with this contract. I told Mr. Cerini, who represented the creditors, about the contract the next day, but I do not believe I showed him the contents until about two weeks later. I showed Mr. Cerini the photostatic copy that I had made of that contract about two weeks later. Mr. Wise had told me I could have it only over night,

(Testimony of F. W. Peters.)

and so for that reason in order to investigate the contract, and study it I had had a photostatic copy made. I told Mr. Wise that I had had a copy made, although not that it was a photostatic copy, and he told me not to display it to anyone. He told me the same thing he said the night before, not to show the copy to anyone.

He told me about this escrow No. 167. During the period of three or four months of conversation I met Mr. Wise once or twice a week for that period. Mr. Resleure then asked Mr. Clark if he had the copies of notices that his office, Clark, Nichols & Eltse sent out to stockholders and creditors, production of which was asked by a notice to produce.

Mr. CLARK.—I cannot find the copies. I do not know who sent them, whether it was sent from our office or sent from the Wise Manufacturing Company.

Mr. RESLEURE.—I will show it to you, Mr. Clark.

Mr. CLARK.—To tell you the truth—I have no copies of that (indicating).

The witness stated that there were copies in the escrow which Mr. Scott had. Mr. Resleure then produced a document which the witness recognized as a copy of a notice sent to all the common stockholders of the Standard Die & Tool [52] Company and the Wise Manufacturing Company, asking them to deposit their stock in escrow with the Bank of America and requesting a ninety day extension of the option to purchase the stock which had already

(Testimony of F. W. Peters.)

been deposited in escrow. It appeared that the notice was not dated but the witness testified that it accompanied an option which was dated May, 1930. Mr. Resleure then produced a document which it was stipulated, was a copy of the original form of option and it was also stipulated that the second form of document was a copy of the extension of the option, whereupon the original form of option was admitted in evidence as

Petitioners' Exhibit No. 4.

The same reads:

OPTION

In consideration of \$1.00, receipt being hereby acknowledged, and without cost to me, I hereby escrow with Bank of America, First Berkeley Branch, the shares of stock described below hereby giving to M. R. Gilbert and/or assignee an option for ninety (90) days from date to purchase said stock at the net price per share as indicated below, to-wit:

Price

Company Certificate No.	No. of Shares	Per Share
Dated:	, 1930.	

The WITNESS then continued:

“Mr. R. Gilbert referred to in the option was the person at the bank who handled this escrow.”

“Mr. Wise told me that the majority of the common stock had been taken up at par, and that some

(Testimony of F. W. Peters.)

few stockholders who owned both common and preferred stock refused to sell common without a sale also of the preferred, and that in these instances both the preferred and the common stock had been purchased. Mr. Wise told me that this form of option had been accompanied by a letter from Mr. Eltse, representing Clark, Nichols & Eltse."

"Mr. Resleure then stated that before the conclusion of the trial he would call for a copy of the letter which accom- [53] panied the original option and then stated that in view of Mr. Clark's stipulation he would offer in evidence the document entitled "Extension of Option" dated May, 1930, which document was received in evidence and marked

Petitioners' Exhibit No. 5.

EXTENSION OF OPTION

In consideration of the obtaining of other like extensions from other stockholders by the optionee, the option heretofore given M. R. Gilbert and/or assignee to purchase my stock in the Standard Die and Tool Company, Inc. and the Wise Manufacturing Company (strike out the Company in which no stock held) is hereby extended for the period of Ninety (90) days from the date of expiration of said option.

Dated: May....., 1930.

(Testimony of F. W. Peters.)

The witness then testified that he took a copy of the letter accompanying the extension of option and asked Mr. Wise to explain it to him, whereupon a copy of that letter was produced and the witness identified it as the letter addressed to the stockholders of Standard Die and Tool Company and Wise Manufacturing Company and signed by Clark, Nichols & Eltse by Ralph E. Eltse, the copy being undated. The witness identified it as an exact copy of the letter which he had taken to Mr. Wise when requesting explanation. Mr. Resleure then offered the copy of the letter to the stockholders signed by Ralph E. Eltse with lead penciled figures "E S. C. 167" in evidence as

Petitioners' Exhibit No. 6".

The same read:

(No date)

"To the Stockholders of Standard Die and Tool Company and the Wise Manufacturing Company:

You are requested to grant to M. R. Gilbert and/or assignee a ninety day extension of option to purchase your stock, for the following reasons:

(a) Certain of the stockholders in the companies [54] are deceased and additional time is required to effect a transfer of their stock from their estates to the optionee, and probate proceedings are necessarily slow.

(b) Details have not yet been completed in connection with advances being secured from eastern capitalists, proceeds of which are to be used in

liquidating present outstanding creditors' claims and in providing funds to the optionee with which to take up the stock under the options. The parties making the advances will not close until they have made a thorough examination of the corporations and assets, including the patents and applications for patents. Patents on several of the applications have not yet been issued, and approximately ninety days will be required before the patents can possibly be issued on the applications. The lenders are carefully checking the patent records at Washington.

Unless the requested extension is granted to the optionee it is doubtful if the creditors' claims can be liquidated and it is feared the creditors will take precipitate action which will mean the stockholders will suffer loss.

You are assured and advised that no more money is to be obtained than is necessary to liquidate the outstanding creditors' claims and to take up the options for the purchase of the stock at its par value.

We solicit your cooperation by the prompt execution and return of the enclosed extension of option.

For your convenience a self-addressed envelope is enclosed herewith.

Yours truly,
CLARK, NICHOLS & ELTSE
By Ralph R. Eltse."

(Testimony of F. W. Peters.)

The WITNESS, PETERS, continued:

“Referring to that letter and to the statement that [55] the creditors might cause trouble, I will say that I talked with Mr. Wise about the connection of that letter with the contract and I pointed out that the contract had already arranged for the formation of the eastern corporation and the payment to the Wise Manufacturing Company of this money. He had shown me the minutes where he raised \$25,000.00 on a chattel mortgage and he told me that the creditors were all paid through the escrow No. 167 through money received from Hays in May, 1930, which was the month in which the option was dated.”

Mr. CLARK.—“Is it stipulated that the mortgage referred to was a mortgage made to A. C. Owens, of the firm of Hays & Hays, which includes Will H. Hays?”

Mr. RESLEURE.—“That is our belief that that is the same mortgage. The only mortgage we find of the identical amount was to Mr. Owens which was put on record”.

“As the option was dated in May, 1930, I wanted to know of Mr. Wise why this letter had been sent to the stockholders threatening action on behalf of the creditors when a contract had already been made in the east providing for funds to be sent out to pay creditors and to take up the stock. I do not remember what the answer was. He showed me a statement of creditors who had been paid, amounting to some \$24,000.00 I believe, and it showed as a

(Testimony of F. W. Peters.)

credit, "received from the Wise Patent & Development Company \$25,000.00", and I asked Mr. Wise what that was for and he told me that was money received from the sale of the patents. "It was at that time and all through the early months that I believed the patent had been sold for \$25,000.00". It was not until I saw this contract on February 23, 1933, that I found that this \$25,000.00 that came through the escrow in the Bank of America was the check received on the chattel mortgage on equipment. [56] Mr. Wise told me that two checks had come through the escrow and that both were signed by Will Hays, one for \$25,000.00 to pay creditors and the other for \$20,000.00 to take up common stock. "I also found that the checks had come through the escrow from an employee of the Bank of America, as well as from Mr. Wise". He told me that the patents sold for \$25,000.00 and I asked him about the preferred share holders and where they were coming into the picture. I told him that the creditors had been paid but that there were still \$25,000.00 worth of preferred share holders. I asked him why the Wise Manufacturing Company, which had received \$75,000.00,—why the preferred stock had not also been taken up; and at that time, he told me that—he believed while he was east that the common stock was the only stock that had a vote, although actually the preferred stock also had a vote in the Standard Die & Tool Company; and I asked him what was going to be done with the money, and he said he was acting for the best in-

(Testimony of F. W. Peters.)

terests of the corporation and of the shareholders, because he was going to be able to take in the common stock at par, and I asked him how much that would take and he said approximately \$18,000.00 or \$19,000.00, and I asked him what was to be done with the difference between the \$75,000.00 he would receive and the \$19,000.00. I asked him what had become of the rest of the money and at that time Mr. Wise did not answer and that is something I never did get an answer to.

“Mr. Wise stated that when he was east he believed the preferred stock did not have a vote. He found out in the meantime that it did have a vote. I had a share with me and we went over it.”

“In 1931, Will Hays was out here on the Pacific Coast stopping at the Mark Hopkins Hotel in San Francisco. Some [57] of the preferred shareholders, mainly Mr. McMahan, was destitute and needed money, and had been writing to Mr. Hays asking him to redeem his stock; they held a meeting, some of the preferred shareholders, in the Mark Hopkins Hotel, in which Mr. White was present, Mr. McMahan, Mr. Hays, Mr. Dobrzensky, representing Mr. Hays, and at that time they entered into an agreement whereby the majority of the preferred shareholders agreed to deposit their stock in escrow with Mr. Woolsey, in Berkeley, reciting a consideration of one dollar, and they waived all of their claims against the corporation and gave them release of all claims, and agreed at that time to take any money they would ever get, from Mr. Wise's one-

(Testimony of F. W. Peters.)

third interest in the Wise Patent and Development Company.

“Mr. Wise told me what I am now stating. He told me that most of the preferred shareholders—all with the exception of \$11,500.00 outstanding at the present time—deposited their preferred stock with Mr. Woolsey with the understanding Mr. Wise’s share in the eastern corporation was to be paid to Mr. Woolsey, to pay back to the preferred shareholders, and at the same time he told me all of his stock in both the eastern corporation and western corporation was pledged to Mr. Hays for the advances which he had made to purchase the common stock out here, and for the advances he had made on the Berkeley note secured by the chattel mortgage and for the endorsement of the Westinghouse note for \$40,000.00, so that, at that time Mr. Wise told me his stock was held in pledge by Mr. Hays.

“I had discussion with him regarding the provisions of the contract of February 27, 1930, permitting him to use the \$75,000.00, or part of the \$75,000.00 to buy up stock of [58] the Wise Manufacturing Company outstanding in the names of others. He told me that this contract provided for \$75,000.00 to be received out of surplus. At that time he said he had been negotiating and working for the Westinghouse Electric Company, perfecting tools and equipment for them to manufacture this multispeed transmission. He said the engineer of that company had offered them \$100,000.00 for an

(Testimony of F. W. Peters.)

exclusive license for the use of the patent. This he told me was prior to the stock market crash in 1929. The negotiations between Wise, Hays and Diehl in the formation of the Wise Patent & Development Company had not been completed at that time and the common stock had not been purchased out here at that time, and the negotiations were still hanging fire with Westinghouse.

“Wise said that a few months later Westinghouse had reduced their offer to \$75,000.00 for the exclusive license for the patent, and that after the transfer of the patents from Wise Manufacturing Company to Wise Patent and Development Company, they were willing to give only \$10,000.00 cash and make a loan of \$40,000.00. He said that this \$40,000.00 was paid to Hays for the Wise Patent & Development Company and then from that \$40,000.00 he was given the \$19,000.00 to purchase the outstanding common stock in this escrow; that the balance of the \$40,000.00 was used for them to pay attorneys’ fees, \$2000.00 to Clark, Nichols & Eltse, \$4000.00 or \$5000.00 to patent attorneys in the east and then there were also some miscellaneous items making up a total of \$40,000.00.

“Q. In the attorneys’ fees, he mentioned a payment of \$3,250.00 to Hays and Hays?

A. Yes; he gave me a letter which he had received from Lon Owens, Mr. Hays’s attorney, [59] in answer to his letter to Mr. Owens asking what had happened to the \$40,000.00 which had been borrowed from Westinghouse.

(Testimony of F. W. Peters.)

“Q. Did he ever admit, state to you, or say anything, concerning the concealment of the contract of February 27th?

“A. He told me no one had ever seen that contract outside of himself, Mr. Hays and Mr. Diehl, until the day I saw it.

“Q. Did he say anything about concealment of the \$40,000.00 loan and the \$10,000.00 cash payment?

“A. Mr. Wise told me no one knew of the disposition of the money; he did not know himself until he had received this letter from Mr. Owens. That was the first time he knew what had happened to the \$40,000.00.

“The witness was next questioned as to what Wise told him as to his ability to close the deal, or the willingness of the Westinghouse Company to have closed immediately, had it not been for the delay occasioned in getting this patent company so that Diehl and Mr. Hays and himself could take over the stock in that company which was to make the money. The witness replied that Wise said that it was a mistake that they did not go ahead with it originally because the Westinghouse Company had spent a great deal of money changing their plant and manufacturing tools with which to make the multispeed transmission, and at that time they could have closed for \$100,000.00 for an exclusive license but for the delay in getting the patent company so that Diehl and Hays and himself could take over the stock in that company which was to make

(Testimony of F. W. Peters.)

the money. He explained that the thing that caused the deal to fail was that they had to have the transfer of the patents from the Wise Manufacturing Company to the Wise Patent & Development Company [60] because the Westinghouse Company would not go ahead with the deal until the Wise Patent & Development Company had a clear title to the patents.”

At this point, the following stipulations were made with respect to the deposit of \$605.00 with the Bank of America, West Berkeley Branch, mentioned in the amended petition:

“Q. Now, did you ever have any conversation with Mr. Wise in regard to the \$605.00 on deposit with the Bank of America, West Berkeley Branch, in the name of H. Jacobsen?

A. Yes, I did.

“Mr. CLARK.—Can’t we stipulate as to the facts with regard to that?

“Mr. RESLEURE.—Yes, I think we can.

“Mr. CLARK.—I have the letter here from Miss Jacobson, showing her withdrawal of the final balance of the account in 1931, in November, charging against that final balance a claim for salary of approximately \$350.00, and remitting the balance of it to Clark, Nichols & Eltse, advising us that if we cared to communicate with her further in regard to it, we should refer to her attorney; that she had this bill for unpaid secretarial services; and the \$150.00

was in November—approximately \$150.00—was in November, 1931, paid to our firm on account of attorney's fees, and the account was closed, and I have here the letter showing the account was closed in November, 1931.

“Mr. RESLEURE.—Well, I do not think I can go that far with the stipulation. As far as I am willing to stipulate, you have the date the account was opened——

“Mr. CLARK (interrupting). I have that in the form of a letter from Mr. Sorrick, the manager of the Berkeley Branch of the Bank of America. [61]

“Mr. RESLEURE.—If you will show me the letter, I will tell you what I am willing to stipulate.

“Mr. CLARK.—I will show you the letter from the lady.

“Mr. RESLEURE.—I am not interested in the letter from the lady, because I think we ought to have her here to cross-examine her.

“Mr. CLARK.—When she got down to \$430.00, she took the balance. Here is her letter. I can give you the exact deposits. Here is a letter signed by Mr. Sorrick, the manager of the West Berkeley Branch of the Bank of America. These deposits were in the West Berkeley Branch of the Bank of America.

“Mr. RESLEURE.—I will go ahead and make the stipulation we are willing to make. We will stipulate that an account was opened in the name of Huldur Jacobsen on June 25, 1931; that the deposits in this account totaled \$612.00; that the ac-

count was closed on November 23, 1931, by the withdrawal of the balance, which existed at that time, namely: \$430.00. That is stipulated?

“Mr. CLARK.—That is stipulated, yes.

“Mr. RESLEURE.—Now, will you also stipulate that the funds that went into that account in the name of Huldur Jacobsen represented moneys of the Wise Manufacturing Company and were derived from the sale of small tools belonging to the Wise Manufacturing Company?

“Mr. CLARK.—That is right.

“Mr. RESLEURE.—And will you further stipulate, as your answer indicates, that the object in putting this money in the name of Huldur Jacobsen was to prevent any of the creditors of the Wise Manufacturing Company ascertaining the existence of these funds and making possible attachment thereon? [62]

“Mr. CLARK.—Well, it was the usual practice of putting funds in there to avoid their being attached. We so stipulate; the funds put in the name of Huldur Jacobsen; deposits put in her name to avoid of it being attached by the creditors.

“Mr. RESLEURE.—And will you further stipulate that these funds were concealed from creditors and from all other persons by the respondent in this manner, having the account in somebody else's name?

“Mr. CLARK.—Well, I think the Court can draw its conclusion that it was a practice perhaps to be condemned. I do not want to stipulate to that conclusion.

“Mr. RESLEURE.—All right.

“Mr. CLARK.—Now, that I have stipulated to that, will you not stipulate that the account was closed, as indicated by that letter sent by Huldur Jacobsen?

“Mr. RESLEURE.—No, I am afraid I cannot go that far, much as I would like to return your courtesy. I would like to have Miss Jacobsen, who is a former employee, here to cross-examine her as to what happened to these funds.

“Mr. CLARK.—Paid out all of them down to that point, under the direction of Mr. Wise.

“Mr. RESLEURE.—We will stipulate that the funds were paid down to \$184 on November 28th, at the direction of Mr. Wise.

“Mr. CLARK.—That is right.

“Mr. RESLEURE.—That is what you want?

“Mr. CLARK.—Yes; that is right, \$184.45.

“Mr. RESLEURE.—Apparently this conflicts—but we will let our stipulation stand.

“Mr. CLARK.—She was written to for the balance of the money, and she was then down at Turlock. Instead of [63] sending the balance of the money,—\$530,—and the bank records show it, she had the account transferred to herself at Turlock,—the balance of \$530. She then sent a letter to Clark, Nichols & Eltse, reciting that she had withdrawn from the account \$345.55 unpaid salary, salary earned prior to April 18, 1931, leaving a balance of \$184.45. She enclosed the check to us for that amount. The bank records show she withdrew the

\$530 on the date indicated in the other letter from which you were reading——

“Mr. RESLEURE (interrupting).—\$430——

“Mr. CLARK (interrupting).—Well, that is a clerical mistake. May I correct that? That is just Mr. Sorrick’s stenographer’s clerical mistake.

“Mr. RESLEURE.—Yes, go ahead, stipulate it was \$530.

“Mr. CLARK.—Yes, \$530.

“Mr. RESLEURE.—In my original stipulation—in other words, in the first stipulation that I narrated, the amount that I stated of \$430, being the balance on hand, should have been \$530, and the mistake was due to a clerical error in the letter.

“Mr. CLARK.—I think our stipulation is perhaps unfinished. You stipulate the lady did withdraw the \$530 as indicated by Mr. Sorrick, or do you want me to call him over here? It is useless.

“Mr. RESLEURE.—Yes, we will admit the \$530 was withdrawn.

“Mr. CLARK.—By Huldur Jacobsen?

“Mr. RESLEURE.—All right; by Huldur Jacobsen.

“Mr. CLARK.—And that she kept \$345.50 of it, and remitted the balance to Clark, Nichols & Eltse. This letter shows it. [64]

“Mr. RESLEURE.—Well, I think we are in hopeless confusion with the stipulation. The letter, as a matter of fact, shows she sent you a check for \$184.45.

“Mr. CLARK.—That is what I said.

“MR. RESLEURE.—But she did not withdraw the entire \$530.

“MR. CLARK.—No. Get this: The account was deposited in the West Berkeley Branch of the Bank of America. She was a clerk of some kind in the Wise Manufacturing Company. She moved to Turlock. When she was requested to remit the balance of this particular account which was deposited in her name, she saw a lawyer—she indicates in her last paragraph she had seen a lawyer—and the bank records show she called for \$530 to be sent to the Bank of America, the branch at Turlock; and she then sent to us a statement showing that she had taken from the \$530, \$345.55, and she remitted to us the balance.

“MR. RESLEURE.—All right. We will stipulate to everything that Mr. Clark says, except we won't stipulate that the \$184 went to pay attorneys' fees, and we won't stipulate that the \$345.55 went to pay prior salary. You can testify, yourself, as to that.

“MR. CLARK.—I have been trying to aid you by stipulating to records. Do you want me to take the deposition of Huldur Jacobsen?

“THE COURT.—I think you gentlemen will be able to agree on that.

“MR. CLARK.—She took the money, we never have been able to collect it.

“MR. RESLEURE.—All right, we will agree to it.

“MR. CLARK.—And will you stipulate we got \$184.85 on account of attorneys' fees? [65]

“MR. RESLEURE.—Yes.

(Testimony of F. W. Peters.)

“Mr. CLARKE.—At that time, November 28, 1931.

“Mr. RESLEURE.—Well, let me see? Where is your other letter—yes, approximately that time.

“Mr. CLARK.—All right.”

The WITNESS PETERS (continued).—“I know that Mr. Wise told me the money (referring to the money mentioned in the foregoing stipulation) was deposited in Miss Jacobsen’s name, and he told me also that she had withdrawn the greater part of it to pay her salary.

“In answer to a question as to whether he had heard Mr. Clark’s statement here that only \$200.00 had been received by the Patent and Development Company from Westinghouse on commissions or royalties, and whether it was correct, Peters stated in substance:”

“I only know what Mr. Wise told me. He explained the original contract with Westinghouse, and stated that it provided for royalties of so much for each machine and half of the royalties were to go to Westinghouse Manufacturing Company to reduce the loan of \$40,000.00, and that Mr. Wise stated that they figured this would be retired within two years from royalties, and the other half was to go to the Wise Patent and Development Company, for distribution to the stockholders, and up to the time I talked with Mr. Wise last February or March there had been approximately \$5000.00 worth of

(Testimony of F. W. Peters.)

royalties received. Over half of it had been paid to Wise Patent and Development Company, but at that time the note of \$40,000.00 had fallen due, and in renewing it they had agreed that all further royalties should be retained by Westinghouse Company to apply on the note. I do not think that Mr. Wise knew exactly [66] what was happening to the \$40,000.00 note. He said Mr. Hays was handling that, and that for any information he wanted he had to go to Mr. Owens. I suggested, in fact, that he should write to Mr. Owens for me.

The testimony of the witness, Peters, was here interrupted to place the witness,

FLOYD B. CERINI,

on the stand, who being first duly sworn testified for petitioners as follows:

“I am an attorney practicing at Berkeley; I am one of the attorneys for the petitioning creditors. I know Roy T. Wise. I recall a conversation between Mr. Wise and Mr. Peters relative to the contract of February 27, 1930 (the contract referred to in the evidence). This was at Mr. Wise’s house; it was probably the first week in March, 1933.”
“Present at Mr. Wise’s home in Berkeley at this conversation, were Mr. Peters, Mr. Wise, myself, and Mrs. Wise.”

(Testimony of Floyd B. Cerini.)

At this point Mr. Clark renewed the preliminary objections which he had made to the testimony of witnesses as to what Mr. Wise said, stating that there was nothing to show that Mr. Wise had authority to make admissions which were binding on the corporation, and that as the right of the corporation to do business was suspended and the testimony was for the purpose of showing facts in concealment and at that particular time, Mr. Wise could not practice concealment. The objection was overruled, the respondent noting an exception.

The WITNESS (continued).—"Mr. Wise was apparently repeating a previous statement he had made to Mr. Peters—that he did not want the contract disclosed to anyone. He stated that very few people knew of it and he mentioned that he did not want Mr. Dobrzensky to know that Mr. Peters had seen the contract. That was the first time I learned about the contract. The next day I saw the photostatic copy of the contract. In a week or two I imparted knowledge of the contract to my clients."
[67]

CROSS-EXAMINATION OF WITNESS CERINI.

"Mr. Wise in the conversation referred to the fact that there had been two other contracts, I believe. I saw a photostatic copy of the letter written by Mr. Owens to Mr. Wise which contained a detailed statement as to what had been done with the \$40,000.00. I believe Mr. Resleure has a copy

(Testimony of Floyd B. Cerini.)
of that. I saw this letter about the same time I saw the contract of February 27, 1930. That was the first week in March, 1933."

Respondent here offered in evidence as their

Exhibit (B)

the letter last referred to. This letter is dated August 22, 1932, and is addressed to Roy T. Wise; the body of the letter reads:

"Referring to your letter of August 8, 1932, to Mr. Will H. Hays, copy of which was sent to me, I note your suggestion that neither you nor Mr. Diehl knew what disposition was made of the \$40,000. obtained on the Westinghouse loan. You are no doubt familiar with this but to revise your memory I will give you some data and expenditures immediately following the receipt of the loan from Westinghouse:

Sept. 2, 1930—Roy T. Wise expenses	189.00
Sept. 3, 1930—Loan to Roy T. Wise	18,723.02
Sept. 13, 1930—Hays & Hays expenses paid	1,039.86
Sept. 13, 1930—Cushman, Bryant & Darby	2,967.18
Sept. 25, 1930—Purchase of 70 shares of this company's preferred stock which had been issued for cash advance	6,742.53
Sept. 25, 1930—Salary of S. A. Fletcher for Aug. and Sept.	1,000.00
Sept. 25, 1930—Payment of note for money advanced	4,029.80

(Testimony of F. W. Peters.)

Sept. 25, 1930—Hays & Hays services	3,250.00
Sept. 25, 1930—Clark, Nichols & Eltse	1,000.00
Nov. 24, 1930—Clark, Nichols & Eltse	1,031.20
Oct. 7, 1931—Cushman, Bryant & Darby	405.00
Oct. 7, 1930—Bank of America of Berkeley	250.00''

The above letter was signed by Mr. A. C. Owens.

The testimony of the witness, Cerini, here ended.

CROSS-EXAMINATION OF MR. PETERS.

“I believe my first visit to the home of Mr. Wise, which was located on Burnett Street, in Berkeley, was the [68] latter part of October or early November. I told him I represented the preferred shareholders, Charles E. Chapman, Professor Franklin C. Palm, Patrick H. McMahon, the Christensens, Theodore Harriman. Those are preferred shareholders who had not turned their stock in to the escrow with Mr. Woolsey in Berkeley. At that time I represented Franklin C. Palm, Patrick McMahon, Charles E. Chapman, Joseph J. Kearney, Soren Christensen, Henry Robb and Theodore Harriman. I did not represent Mr. Henderson. There was a Mr. Soren Christensen and two other members of that family. Professor Palm had power of attorney from all of these people to act for them, and he retained me. He took me down to see Mr. McMahon and Professor Chapman personally, and he communicated with the other shareholders and got their consent to my

(Testimony of F. W. Peters.)

acting for them. In talking with Mr. Palm he told me of the filing of an action by an attorney by the name of Waddell. I then went to San Francisco to the clerk's office, adjacent to this court room, and examined the records in that case. I read the complaint through. I did not take a copy of it. I have no recollection that that complaint recited that the existing contract between Hays, Wise and Diehl provided for the formation of a corporation named the Wise Patent and Development Company, which was to have 2500 shares of common stock. I did go to see Mr. Waddell personally, and it was for that reason I went over the complaint once, which is here in this court room, and then I went down to see him personally, and I have not looked at that complaint since. After I read this complaint and saw that it referred to the stock structure of the Wise Patent and Development Company, which company is referred to in one of these three contracts, I asked Mr. Palm as to how it [69] was they gained the knowledge which they incorporated in the complaint filed in November, 1931. Mr. Palm stated that he had no knowledge of the contracts that had been made among these three men. He stated that to me by saying that Mr. Waddell had been a director of these companies, and I believe an officer of one of them, and that it was for that reason that they had retained Mr. Waddell to handle this matter for them, and Mr. Waddell drew a complaint from his own knowledge, Mr. Palm signing it at Mr. Waddell's request. He did not say that he had verified the com-

(Testimony of F. W. Peters.)

plaint. He said he had signed the complaint, representing the stockholders.”

There was here offered in evidence, as the

Respondent's Exhibit "C"

the files in Case No. 3114-S of the office of the Clerk of the United States District Court, Northern District of California. The complaint in said case was in substance as follows:

It was entitled in the above entitled Court. It named as plaintiffs, Franklin C. Palm, individually and as attorney in fact of Horace N. Henderson, Patrick H. McMahon, Charles E. Chapman, Josephine J. Carney and Soren Christensen, and Henrietta Huff. It named as defendants, A. M. Diehl, W. H. Hays, Roy T. Wise, and Wise Patent and Development Company. A summary of its allegations, except where quoted, follows:

Par. 1 alleged that plaintiff was a resident and citizen of the State of California.

Par. 2. That defendants Diehl and Wise are now residents of Pittsburg.

Par. 3. That Wise Patent and Development Company is a Delaware corporation, but that it is not qualified as a foreign corporation to do business in California.

Par. 4 and Par. 5. That Standard Die & Tool Com- [70] pany, Incorporated, and the Wise Manufacturing Company, are California corporations.

Par. 6. That W. H. Hays is a resident of Sullivan, Indiana.

Par. 7. That the capital stock of Standard Die & Tool Company was 700 shares of common stock and 300 shares of preferred, par value of each share being \$100.00.

Par. 8. That the total capital stock of the Wise Manufacturing Company was 37,500 shares, without par value.

Par. 9. "That during all the times herein mentioned the plaintiff has been and now is the owner of 20 shares of said 8% preferred capital stock of said Standard Die & Tool Company, of the par value of \$100.00 per share. That plaintiff, has been and now is the duly appointed attorney-in-fact of Horace N. Henderson, Patrick H. McMahan, Soren Christensen, Charles E. Chapman, Henrietta S. Huff and Josephine J. Carney, and that plaintiff by said appointment as said attorney-in-fact has been and now is authorized by the above named parties and each of them to bring this action for them and in their behalf, and in behalf of each of them. That the said parties during all the times herein mentioned have been and now are the owners of shares of said 8% preferred capital stock of said Standard Die & Tool Company as set forth as follows, to-wit: Patrick H. McMahan, 30 shares of the par value of \$100.00 per share; Charles E. Chapman, 20 shares of the par value of \$100.00 per share; Soren Christensen, 30 shares of the par value of \$100.00 per share; Horace N. Henderson, 5 shares of the par value of \$100.00 per share; Hen-

rietta S. Huff, 5 shares of the par value of \$100.00 per share; Josephine J. Carney, 10 shares of the par value of \$100.00 per share.”

Par. 10. “That on or about the 1st day of August, 1929, the stockholders of said Standard Die & Tool Company, voted to transfer the assets, business and liabilities of said Standard Die & Tool Company, to said Wise Manufacturing Company. That at said time, the said common stockholders of said Wise Manufacturing Company were also the said common stockholders of said Standard Die & Tool Company and said common stockholders by reason of their said holdings of the common capital stock in each of the said corporations, owned and controlled each and both thereof. That at said time more than one-half of the said common capital stock of said Standard Die & Tool Company and of said Wise Manufacturing Company, was owned by the defendant, Roy T. Wise.”

Par. 11. “That pursuant to said vote of said stockholders of said Standard Die & Tool Company, the assets and business of said Standard Die & Tool Company were conveyed and transferred to said Wise Manufacturing Company on or about August 1st., 1929. That among the assets of said Standard Die & Tool Company so transferred and conveyed as aforesaid, were certain United States patents upon a multi-speed transmission, which said patents had been issued to the defendant, Roy T. Wise, [71] under Letters Patent issued by the United States Patent Office. That prior to the said transfer of assets by said Standard Die &

Tool Company to said Wise Manufacturing Company on August 1st., 1929, said Roy T. Wise had transferred to said Standard Die & Tool Company the said patents and each of them, and had received in exchange therefor the hereinabove mentioned shares of the common capital stock of said Standard Die & Tool Company, standing in his name. That the plaintiff is ignorant of the serial numbers and dates of issuance of part of said patents, but that two of said patents bore the following names, dates of issuance, and serial numbers, to-wit: Wise Constant Mesh Gear Transmission Clutch, United States Patent Serial No. 378,826 and dated July 17, 1929; and Wise Constant Mesh Transmission For Electric Motors, bearing United States Patent Serial No. 380,634, and dated July 24th., 1929.”

Par. 12. “That said Horace N. Henderson, Patrick H. McMahon, Charles E. Chapman, Josephine J. Carney, Soren Christensen, Henrietta Huff, and plaintiff, had each purchased the respective numbers of shares of the said 8% preferred capital stock of said Standard Die & Tool Company as hereinabove set forth in Paragraph No. 9, upon the representations and statements of the defendant, Roy T. Wise, that the said patents and each of them herein referred to were and each of them was of great value, and that said Roy T. Wise by his said majority stock ownership of said Standard Die & Tool Company would make large and continuing profits from the manufacture and sale of the said patented devices. That said Roy T. Wise further represented to plaintiff and the stockholders in this paragraph

named, that the said transfer of the assets and business of said Standard Die & Tool Company to said Wise Manufacturing Company would greatly facilitate the said manufacture and sale of said patent devices, and would enhance the future profits to be derived from said continuing business. That the said stockholders in this paragraph named, and each of them, purchased the shares of stock herein enumerated in Paragraph 9 by reason of the reliance they and each of them placed in the said statements of said Roy T. Wise. That the said statements of said Roy T. Wise and each and all thereof were false, and were made by said Roy T. Wise with the intent and purpose of defrauding the above named stockholders and each of them.”

Par. 13. “That on or about the 5th day of March, 1930, said Roy T. Wise by reason of his said control of the common capital stock of the said Wise Manufacturing Company, and by reason of his control of the common capital stock of the said Standard Die & Tool Company, caused the directors and officers thereof to transfer the said patents, and all the assets and business of said corporations, and each of them, to the Wise Patent & Development Company, a Delaware corporation. That the plaintiff is informed and believes and therefore states the fact to be that the capital stock of said Wise Patent & Development Company was and is divided into 1000 shares of preferred capital stock of the par value of \$100.00 per share, and 2500 shares of common capital stock of no par value. That plaintiff is informed and believes and therefore states

the fact to be that all the said capital stock, of said Wise Patent & Development Company, except for approximately five qualifying shares, is owned share and share alike by the defendants, A. M. Diehl, W. H. Hays and [72] Roy T. Wise. That the defendants Wise Patent & Development Company, A. M. Diehl, and W. H. Hays, secured their respective interests in said patents, assets and business as hereinabove set forth with full knowledge of the representations made to said stockholders by said Roy T. Wise, and with full knowledge that the said transfer of said patents, assets and business was and is a fraud upon the rights of said preferred stockholders herein named. That the said stockholders herein named in Paragraph No. 9, have received, nothing for their shares of preferred capital stock, for which the sum of \$100.00 per share was paid by them. That the common stockholders of said Wise Manufacturing Company have been paid the sum of \$20.00 per share for their stock; and that the holders of the common capital stock, and of certain shares of the preferred capital stock of said Standard Die & Tool Company have received the par value of their said shares after said March 5th, 1930."

Par. 14. "That by the terms of the Articles of Incorporation of said Standard Die & Tool Company, it is provided as follows, to-wit:

"In the event of the liquidation or dissolution, whether voluntary or involuntary of this corporation, or the sale of all its assets; or in the event of its insolvency, the holders of the preferred stock shall be entitled to be paid in full both the unpaid

dividends accrued thereon, if any, and the par value of their respective shares before any amount shall be paid to the holders of the common stock; and the holders of the common stock shall be entitled to the remaining assets.”

“Except as to matters and things hereinabove stated, no distinction shall exist between said classes of stock or owners thereof and no preference shall be granted nor shall any distinction be made between the classes of stock either as to voting power, or as to statutory or constitutional liability of the holders thereof to the creditors of this corporation.”

Par. 15. “That the said transfer of the said patents, business, and assets of said Standard Die & Tool Company and said Wise Manufacturing Company dated on or about March 5th, 1930, was and is a fraud upon the preferred stockholders named in Paragraph 9 and upon plaintiff. That the proceeds of said transfer have been distributed contrary to and in violation of the Articles of Incorporation of said Standard Die & Tool Company and in fraud of the rights of stockholders of said company herein named. That the defendants A. M. Diehl, W. H. Hays and Wise Patent & Development Company were and are parties to said transactions and knowingly participated therein.”

The complaint prayed that the defendants should be compelled to pay the plaintiffs the full par value of the stock or that the defendants Wise, Diehl and Hays should be required by the Court to cause the defendant Wise Patent and Development Company should retransfer the patents to the Standard Die

and Tool Company. The complaint prayed for general equitable relief, [73] and for costs. An affidavit was attached to the complaint, reading as follows:

“FRANKLIN C. PALM, being first duly sworn, deposes and says: That he is the plaintiff in the above entitled action; that he has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge, except as to those matters that he believes it to be true.

FRANKLIN C. PALM.”

This complaint was marked “Filed November 30, 1931.”

In the same file was a stipulation, filed January 29, 1932, extending the time to plead of any such defendants as had been served to February 27, 1932. This stipulation was signed by George F. Sharp and James Waddell, as attorneys for the plaintiffs. The file showed another stipulation filed February 27, 1932, reciting that no default was to be taken, and that any such service on any of the defendants as had been made was abortive and that the defendants would not be required to appear unless they were legally served.

In the same file was a Notice of Substitution of Attorneys. It was entitled in the case, and it was signed by George F. Sharp and James Waddell, as the former attorneys for the plaintiffs, and by the said Frederick W. Peters as the substituted attorney. This notice was dated February 2, 1933, and it was filed February 6, 1933. The notice was addressed to Clark, Nichols & Eltse.

CROSS-EXAMINATION OF WITNESS
PETERS (resumed).

“Mr. Waddell did not mention to me that he was the attorney for the petitioner, Mr. Olin, who recovered one of the judgments referred to in the petition in this case. I did not ask Mr. Waddell as to whether he had any information of any sort relative to the agreement that had been made among the three men, Wise, Hays and Diehl. I did not ask because at that time [74] I had no knowledge of any agreement. In fact, I asked Mr. Waddell if he knew what had happened to the patent and who owned it, and he said he did not. I read this complaint here over once, and I tried to get in touch with Mr. Waddell at least a half a dozen times after that, and he was always too busy to see me.”

“Q. In the course of your conversation with Mr. Wise, in which he stated that the contracts had not been shown to anyone excepting—insofar as he knew—excepting those three people, and after Mr. Wise had made that statement to you, did you not put some question to Mr. Wise, ‘How is it, Mr. Wise, that in November, 1931, Mr. Waddell was able to file a complaint reciting in substance the chief feature of this agreement between Wise and Diehl and Hays’?”

A. I never mentioned the first complaint to Mr. Wise at any time except to tell him I knew it had been filed, and I did not think it was of any use.

Q. Now, you state that Mr. Wise let you have the minutes of this corporation, the Wise Manufacturing Company, and of the Standard Die & Tool

(Testimony of F. W. Peters.)

Company, and the books of these two corporations, for a period of two weeks?

A. Approximately, yes.

Q. Did you examine all of these records which he delivered to you and allowed you to keep for this period of time?

A. I did.

Q. You state, on your direct examination, that you read every resolution of the boards of directors of these two corporations through?

A. I believe I did." [75]

"I did not examine the ledgers and journals and ordinary accounts of the two companies to find what debts had been paid through Escrow 167 at the Bank of America. Mr. Wise gave to me a statement showing he received from the Wise Patent and Development Company \$25,000.00, which he said was received for the sale of the patents, and that listed a long list of creditors which he said had been paid through this Escrow 167 at the Bank of America. I asked Mr. Wise for the books and correspondence, and he said there was too much there. He stated that he would give me what I asked for. That offer was not open after I had made a two weeks examination of the minutes for after having the books for two weeks, I took them back to him and asked him at that time for the correspondence with Will Hays, and he refused to give me the correspondence. He showed me one or two letters, he told me that he had given Hays a copy of every directors' meeting and stockhold-

(Testimony of F. W. Peters.)

ers' meeting of [76] the company, sending them east to Hays and corresponding with him. He showed me only one letter he had received from Alonzo Owens. He showed me that letter in answer to my inquiry as to what had happened to the \$40,000.00. That letter accounted for the \$40,000.00. That letter is Respondent's Exhibit "B". They did renew the \$40,000.00 note to the Westinghouse Company. He did not say to me that the note had been renewed for an amount which was the original amount less royalties, and that the royalties were less than \$1000.00. He merely told me he had renewed the note under the pressure of the Westinghouse Company, and that they were going to refuse to renew the note any longer and were pressing Mr. Hays and Mr. Diehl."

"Q. Did he not also say this: that when they made the contract, they thought the returns from the royalties would be so great that it was understood between Westinghouse Company and these three men that one-half of the royalties would go to the Patent Company, the Wise Patent & Development Company, and the other half should be applied on the note? Didn't he say that?

A. He told me that was the original agreement, and he expected the royalties to pay off the note within two years.

Q. Didn't he say this to you, too: that the royalties had been so little that the Westinghouse Company had insisted that the whole of the royalties be applied on the note which was renewed?

(Testimony of F. W. Peters.)

A. He said they had been reduced, and because no—no payments had been made on the principal—and that they had insisted on the renewal of the note, and that all royalties be applied to the note.

Q. In other words, they were not prepared to pay off the note when its due date arrived, they got it renewed, and that Westinghouse Company insisted that all the [77] royalties that came in on this contract should be applied on that note?

A. Yes.

Q. And you left with that understanding and you never checked it or investigated, to determine whether there were any facts to the contrary?

A. I beg your pardon, I did. I asked Mr. Wise for a copy of the contract of Westinghouse, and I asked for the correspondence.

Q. I mean, from that time forward, you have rested content, as the representative of the Professor and these other people, with the idea that that note was lodged there and that it was being paid off only with such royalties as may come in due to the Wise Patent & Development Company?

A. No. I asked Mr. Wise about that the last time I saw him, and he told me that the Westinghouse Electric Company was pressing Mr. Hays for payment because they did not want to renew the note, and that is one of the reasons he did not want Mr. Hays to know I saw the contract, that Westinghouse was pressing Mr. Hays and Diehl for the payment of the note, and did not know

(Testimony of F. W. Peters.)

whether they would renew it the following September, when it fell due or not.”

The cross-examination of the witness, Peters, continued as follows:

Mr. Clark next asked the witness if Mr. Palm had ever mentioned to him that Mr. Wise, early in 1931, had offered to the preferred stockholders to turn over to them everything he had received out of his stock, anything that was promised to him, that is out of this Wise Patent and Development Company, if they would simply consent to take it subject to the burden of the indebtedness unpaid to Owens. The witness replied that Palm never mentioned such a thing. [78]

The witness testified that he had never represented Mr. Palm at any other time than the Palm vs. Diehl suit mentioned in the testimony.

“Q. Did he state to you he had been invited to go to the Bank of America and deposit his stock and sign an agreement to a trust there created by Mr. Wise, wherein he agreed that—without stating exactly what the terms of the contract were—wherein Wise agreed he would hold everything coming to him under these contracts for the use and benefit of the preferred stockholders of the Standard Die & Tool Company?

A. No, Mr. Palm did not tell me anything about that, Mr. Clark. That was told by—I believe it was Mr. White—oh, yes, he told me that at some meeting in San Francisco in 1932, that Mr. Wise

(Testimony of F. W. Peters.)

had offered to put up his shares of the company in escrow with Mr. Woolsey. I think that is what we are talking about; and the preferred shareholders were to turn in their stock and release all rights they had against the Standard Die & Tool Company or against the Wise Manufacturing Company.

Q. Now, Mr. Palm told you that was proposed at a meeting at which he attended?

A. No, Mr. Waddell had gone over to represent them, and Mr. White had gone over, and Mr. McMahon had gone over, Mr. Eltse and Mr. Dobrzensky.

Q. Mr. Waddell is the gentleman with whom you conferred about the suit which had been filed in which the stockholders wanted to get this bonus, or whatever it might be called, that was to go to Wise, isn't that true?

A. No. They filed that suit, Mr. Waddell told me he figured from the complaint—just what he told me after I [79] read the complaint—that there was fraud involved in the transaction some place, that he did not know very many of the facts, but he did know the patent had been transferred out of the Wise Manufacturing Company, or had been assigned, and that he did not know what had been received for it.

Q. Then Waddell told you that when he drew that complaint he knew that fraud had been practiced upon the stockholders and everyone concerned in the Wise Manufacturing Company, did he?

(Testimony of F. W. Peters.)

A. No, he did not. He said that there was some fraud involved in the whole case, but he did not know for sure; in fact, he said he knew very little about the whole situation, even as a director of the company.

Q. Did he tell you that the fraud inhered in the making of that particular agreement which called for the creation of a corporation known as the Wise Patent & Development Company, in which the shares of stock were to be \$2500, as recited in the Palm case?

A. He never mentioned that.

Q. You went to the bank also for the purpose of examining the records connected with this escrow?

A. No, I did not.

Q. You never talked then with anyone at the Bank of America?

A. I talked—I believe I called up the manager over at the bank and asked if I could have access to the escrow, and I was referred to Clark, Nichols & Eltse. Mr. Cerini then went over to see Mr. Eltse, and told him we were investigating in the matter, and asked merely if he could go over to the bank and examine the escrow, and Mr. Eltse said absolutely none of their records were open to us.

Q. Did anyone tell you that early in—that in March, 1931, Mr. Wise had tendered everything that he had obtained under this contract arrangement with Diehl and Hays—everything he had [80] obtained under it—to the Bank of America,

(Testimony of F. W. Peters.)

asking them to act as trustees for these preferred stockholders, so that they might have distributed to them everything that he had received out of that contract in proportion to the stock holding?

A. Never.

“Mr. CLARK.—Q. Of course, you were not very greatly surprised that the exact terms of this contract had not been broadcast?

A. I never heard of the contract until Mr. Wise showed it to me.”

“I noticed the resolution in the minutes of the company, of December 31, 1929, reciting that the company was in distress and was being pressed by its creditors, and must execute a series of notes to about 15 creditors in order to get time, together with other things recited. I knew the company was indebted. Wise told me the condition of the company generally and that it was in distress in 1929, and that they had a great many outstanding creditors, and that he was trying to raise money to pay off the creditors. I did not know that following 1929 Wise contacted Hays and Diehl and tried to get them to advance \$25,000.00 to meet the claims of the creditors, in fact Mr. Wise told me that he had gone to Los Angeles, and I believe there was a resolution in the minute book reciting that he had met Hays, I believe it was, in Los Angeles, and giving him authority to go east and raise \$75,000.00.”

(Testimony of F. W. Peters.)

The witness' attention was called to the minutes of the meeting of the directors of the Wise Manufacturing Company, of January 27, 1930, which were read by Mr. Clark. These minutes included the following:

“President Wise discussed conference with Mr. Will Hays on his trip to Los Angeles January 21st to 25th. During conferences Mr. Hays telephoned A. N. Diehl, Vice President of the Carnegie Steel Company of Pittsburgh and made a definite appointment for Mr. Wise to discuss the possibility of refinancing, License to Manufacture, or the probability [81] of outright sale. Mr. Will Hays is to act as our counsel in this matter—no definite plan having as yet been determined. At Mr. Will Hays' suggestion, Mr. Wise is to take 5 HP Westinghouse motor and transmission, together with pony brake, and demonstrate it to concerns as recommended by Mr. Hays.

Motion was made by Mrs. Wise, seconded by Mr. Olin, to give our attorney James E. Waddell authority to use his best judgment in the settlement of our account with the Kidelite Company of Lewiston, Idaho.”

The witness then testified:

“I discussed in a general way the contents of these minutes with Mr. Wise. I was trying to find how Mr. Hays came into the picture.”

(Testimony of F. W. Peters.)

“Q. And he came in right in the midst of this distress?

A. Yes.”

Peters then testified in substance as follows: That he had noticed the resolution gotten up on March 10th, 1930, employing auditors to make up a full list of the debts of the concern, and he saw a list of the debts compiled which he (Wise) had presented to Mr. Van Dine.

The witness continued:

“I know that Mr. Van Dine had put a list of these debts with the bank. Mr. Wise told me that the money had been paid out by Clark, Nichols & Eltse to this list of creditors. I noticed that Mr. E. W. Olin had been elected Secretary-Treasurer of this company. I know he was one of the directors.”

Peters next testified that he had read the minutes of the meeting of March 10th, 1930, and when questioned as to whether he had noticed therein a waiver of notice of meeting of directors to be held April 11th, replied that he had noticed in the minutes quite a few of those waivers. He admitted that he had no difficulty in finding out that Hays and Diehl were the men with whom Wise was dealing after reading those minutes. He also stated

(Testimony of F. W. Peters.)

that Mr. Olin, who signed the minutes as secretary at page 25 of the minutes of the Wise Manufacturing Company [82] as secretary, is one of the petitioning creditors.

The minutes of April 11, 1930, from page 25 of the minute book, were here read, as follows:

“Director Pansey E. Wise read a letter received from Mr. Roy T. Wise, President of this Company, wherein Mr. Wise requested authorization to negotiate in the name, and for the benefit of the corporation, a loan of \$25,000 the said sum to be used to satisfy current claims of creditors of this corporation pending sale of corporate assets to Messrs. A. N. Diehl, Will Hays, et al.

It appears from Mr. Wise’s letter that some time might elapse before the validation and check-up of patents of The Wise Manufacturing Company involved in the sale.

A resolution was passed, a copy of which is attached hereto and made a part hereof, authorizing the President and Secretary in the name of the Corporation and under the corporate seal to execute a promissory note in the principal sum of \$25,000, bearing interest at the rate of not to exceed 8% per annum.

There being no other business before the meeting, the same was on motion made, seconded and carried declared duly adjourned.

ROY T. WISE
President

E. W. OLIN
Secretary”

(Testimony of F. W. Peters.)

The witness continued:

“I remember reading that resolution, and that raised a question in my mind as to where Alonzo Owens came in, and I went down and talked with Mr. Wise about that resolution. I believe Mr. Wise executed the \$25,000.00 note at the time mentioned in the resolution, and sent through the resolution or requested them to pass it for him. I do not remember Wise telling me that Hays let Wise on his mere promise have \$25,000.00 or substantially that sum before they fixed the papers up. In fact, he told me Mr. Hays was not involved in this when I first went down to see him. It was almost a month and a half before I found out that the \$25,000.00 advanced by Owens was really the money advanced by Hays. Mr. Wise had tried to conceal the fact that Hays had advanced the \$25,000.00.”

“Q. But you did afterwards ascertain the fact that A. C. Owens was simply an attorney in Mr. Hays’ office, and in whose name a deed of trust was given?”

A. I cannot say that, because when I asked Mr. Wise about the foreclosure of the mortgage he said that that promissory note was still in Mr. Owens’ name, and Mr. Owens had foreclosed the mortgage, and he had written to Mr. Hays protesting about it, and that the money was Mr. Owens, and he held the mortgage; and so I am not sure still in my own mind exactly how that was——”

“In my examination of the minutes I believe I noticed the resolution of the Wise Manufacturing Company of May 26, 1930.”

The resolution of that date was here read, it being [83] the resolution authorizing the borrowing of \$25,000.00 which resolution is Petitioners' Exhibit 2.

Thereupon the following occurred:

Q. Did you also, in checking the records of this corporation, encounter a resolution of May 5, 1931, authorizing the Standard Die & Tool Company to transfer the patents to the Wise Patent & Development Company?

A. I do not know, Mr. Clark. I know there was something to that effect, but I do not remember what it was. You will have to refresh my memory. I do know there was some such resolution, and it was not adopted by all of the directors. I think there was some resolution merely passed by Mr. Wise and Mrs. Wise as being the only directors present.

Mr. RESLEURE.—There is such a resolution, and I submit it should go into evidence.

The witness here identified a certain Minute Book of the Standard Die & Tool Company as containing the minutes of the meeting of the directors of said company held May 5, 1930. These minutes showed that Mrs. Wise and Mr. Olin were present at the meeting. The minutes also showed that Roy T. Wise had signed the minutes of the meeting. The minutes showed the adoption of the following resolution:

“BE IT RESOLVED: That the Board of Directors of the Standard Die and Tool Company, Inc., sell, assign and transfer to the Wise Patent and Development Company, its successors, assigns and legal representatives, all those certain patents and applications described as follows:

Patent 1,745,075, granted January 28, 1930, to Roy T. Wise, for Improvements in Three-Speed Transmission;

Appln. of Roy T. Wise for Letters Patent of the United States for Certain new and useful improvements in Constant Mesh Gear Electric Motor, Serial No. 283,248, Filed June 6, 1928; [84]

Appln. of Roy T. Wise for Letters Patent of the United States for certain new and useful improvements in Two-speed Transmission—Serial No. 283,247, Filed June 6, 1928;

Appln. of Roy T. Wise for Letters Patent of the United States for certain new and useful improvements in Transmission Clutch, Serial No. 296,659, filed August 1, 1928;

Appln. of Alfred Wasbauer for Letters Patent of the United States for certain new and useful improvements in Three-speed Constant Mesh Gear Electric Motor Transmission—filed January 4, 1928—Serial No. 244,434.

AND BE IT FURTHER RESOLVED: That this corporation does hereby authorize and request the Commissioner of Patents to issue the Letters Patent to issue upon the said pending applications

to the said assignee and that this corporation execute any and all further papers requested by said assignee, its successors, assigns and legal representatives, to fully sell, transfer and assign, without further remuneration to this corporation, any and all applications filed or patents granted for said inventions in countries other than the United States to the end that title thereto shall be fully perfected in said assignee.

AND BE IT FURTHER RESOLVED: That the Secretary of this corporation execute such an assignment as authorized by this foregoing Resolution and that upon the execution of the same and as a part of the execution thereof, she affix the corporate seal thereto.”

There was here placed in evidence, as

Respondent's Exhibit "D"

a contract dated May 8, 1930, signed by Roy T. Wise, as first party, and Ambrose N. Diehl and Will Hays, as second party. This contract read as follows: [85]

SUPPLEMENTARY AGREEMENT.

THIS SUPPLEMENTARY AGREEMENT, made and entered into this eighth day of May, 1930, by and between Roy T. Wise, of Berkeley, California, party of the first part, and Ambrose N. Diehl, of Pittsburgh, Pennsylvania, and Will H. Hays, of Sullivan, Indiana, parties of the second part, witnesseth that,

WHEREAS, the parties hereto did, under date of February 27, 1930, enter into a certain written agreement, relative to certain inventions and patents, and certain applications for patents for applying various transmission speeds to induction motors, and

WHEREAS, by said agreement of February 27, 1930, it was contemplated that a corporation would be formed under the laws of the State of Delaware, to be known as the Wise Patent and Development Company, with a capitalization of 1200 no par value shares of common stock, and

WHEREAS, since said date and the making of said contract the parties have mutually agreed to change the authorized capital of said corporation and a corporation pursuant to such mutual agreement has been organized under the laws of the State of Delaware in the name of Wise Patent and Development Company, with a capitalization of 2500 no par value common shares and 1000 shares of preferred stock of a par value \$100.00 per share, and

WHEREAS, it is the mutual desire of the parties hereto that said contract of February 27, 1930, be supplemented and modified as herein provided,

NOW, THEREFORE, in consideration of the mutuality hereof and the sum of one (\$1.00) dollar, each to the other paid and for other valuable and sufficient considerations, the receipt of all of which is hereby acknowledged, it is agreed by and between the parties hereto as follows: [86]

A. That Item 2 of said contract of February 27, 1930, be and the same is modified to read as follows:

That the capital stock of the said Wise Patent and Development Company shall consist of 3500 shares, of which 1000 shares of the par value of \$100.00 each, amounting in the aggregate to \$100,000.00, shall be preferred stock, and of which 2500 shares without par value shall be common stock, of the common stock 1500 shares shall be issued as follows: 25 shares shall be first issued to the five directors of said corporation and later acquired by the parties hereto and reissued $8\frac{1}{3}$ shares to Roy T. Wise; $8\frac{1}{3}$ shares to Ambrose N. Diehl; and $8\frac{1}{3}$ shares to Will H. Hays, $458\frac{1}{3}$ shares shall be issued to Roy T. Wise and by him assigned to Ambrose N. Diehl; $458\frac{1}{3}$ shares shall be issued to Roy T. Wise and by him assigned to Will H. Hays; $458\frac{1}{3}$ shares shall be issued to Roy T. Wise, and 100 shares shall be issued to Roy T. Wise to be used by the party of the first part in the complete discharge and release of the said party of the first part and said patents, applications and rights from any and all claims, if any, against said party of the first part, or his assignees, or the said Wise Patent and Development Company, or the Standard Die and Tool Company, Incorporated, or the Wise Manufacturing Company, by B. K. Gillespie of Los Angeles, California, and Owen B. Smith, of Oakland, California, or either of them, provided, however, [87] that such 100 shares so to be issued for

such purpose to the party of the first part shall be so used by him as that the voting right in such 100 shares remains in the party of the first part and the parties of the second part jointly for a period of two years from the date of issue, it being understood that while there is no legal claim against the party of the first part by the said B. K. Gillespie and the said Owen B. Smith, the party of the first part desires to reward them for certain services heretofore rendered by them in indirect relation to this transaction. It is understood that all of such 1475 shares of common stock shall be issued fully paid and non-assessable in exchange for such assignments of such patents, applications and rights, all as herein provided for which said party of the first part undertakes to cause and has caused to be assigned.

B. The party of the first part hereby acknowledges receipt of six hundred fifty (\$650.00) dollars, provided to be paid in item 5 of the agreement of February 27, 1930, such sum having been advanced by the parties of the second part herein for the account of Wise Patent and Development Company as a loan.

C. The parties of the second part have heretofore made advancements to the party of the first part for the account of the Wise Patent and Development Company and the parties of the second part shall be entitled to reimbursement of any sums so paid before the party of the first part shall be entitled to any portion of the seventy-five thou-

sand (\$75,000.00) dollars provided for in Item 7 of the agreement of February 27, 1930. [88]

D. The parties hereto further agree that they will cooperate to the end that the Wise Patent and Development Company will issue and sell the 1000 shares of Preferred Stock in the Wise Patent and Development Company at and for the price of \$95.00 per share and issue and sell the remaining 1000 shares of no par value common stock in said Company at \$5.00 per share, along with such Preferred Stock, and that 250 shares of such Preferred and Common Stock be sold immediately and the remainder thereof sold at such time as the President of said company shall deem necessary, and that from the proceeds of the sale of said stock the Wise Patent and Development Company shall loan to the party of the first part herein a sum not exceeding Seventy-Five Thousand (\$75,000.00) Dollars from time to time, taking his promissory note, or notes, therefor to the satisfaction of the parties of the second part and said Wise Patent and Development Company, and assign as collateral security for such note or notes the stock owned and/or controlled by the party of the first part in the Standard Die and Tool Company, Incorporated, and the Wise Manufacturing Company, both California corporations, and will further cause to be pledged by said California corporations all of their assets of whatsoever kind or nature and in such form and manner as is satisfactory to the parties of the second part herein and to the Wise Patent and Development Company and will assign and deliver and transfer to the Wise

Patent and Development Company all of his stock in said Wise Patent and Development Company for further assurance as collateral and as security for such loan.

The party of the first part agrees that in the event of making of such loan by the Wise Patent and Develop- [89] ment Company he will use the funds derived therefrom in the retirement of obligations and in the purchase of stock owned by others in the said California corporations and furnish the parties of the second part of evidence of such application of funds. It is mutually understood between the parties that such loan is subject to appropriate approval and corporate action by the Wise Patent and Development Company and that said company could not loan money except in its direct relation to the acquiring of property rights from the party of the first part and the said California corporations, and in connection with such advancements and loans so made.

The advancement or loan of said \$75,000.00 or any part thereof by the Wise Patent and Development Company shall in no event be considered as payment or part payment of the \$75,000.00 mentioned in said contract of February 27, 1930, and the party of the first part herein shall not be entitled to any portion of the \$75,000.00 mentioned in said contract except, when, as and if, the sum is available from surplus accumulated over the expense of operating the Wise Patent and Development Company, as provided in said contract of February 27, 1930, and it is agreed that Preferred

Stock Dividends shall constitute a part of expense of operating said company.

It is understood between the parties that the party of the first part may need a substantial portion of the said sum of \$75,000.00, which he is requesting the Wise Patent and Development Company to loan him and the party of the first part obligates himself to secure as fully as possible the advancement [90] of said sum of \$75,000.00, or any part thereof, and cause the Standard Die and Tool Company, Incorporated, and the Wise Manufacturing Company, in which companies the party of the first part owns the controlling interest, to execute such document or documents as will afford the greatest security for such loan in view of the fact that the funds so requested are to be used by the party of the first part incident to his acquiring stock in said California Companies and in payment of obligations of said companies, and the undersigned further represents that he will transfer and assign the stock in said California corporations and the said stock in the Wise Patent and Development Company as security for such sum or sums so advanced.

E. The party of the first part agrees to protect the validity of the patent and applications for patents against all claimants and against infringement. Should it appear advisable to acquire a patent or patents having damaging claims the party of the first part agrees to procure such patent or patents and to cause them to be duly assigned to the Wise Patent and Development Company.

IN WITNESS WHEREOF the parties hereto have executed this agreement in triplicate on the day and year first above written.

Roy T. Wise
Party of the First Part
A. N. Diehl
Will H. Hays
Parties of the Second Part [91]

The respondent next offered and it was received in evidence as the

Respondent's Exhibit "E"

a contract dated September 1, 1930. This contract read as follows: [92]

This Agreement, made and entered into this first day of September, 1930, by and between Roy T. Wise of Berkeley, California, hereinafter called First Party, and Ambrose N. Diehl of Pittsburgh, Pennsylvania, and Will H. Hays, of Sullivan, Indiana, hereinafter called Second Parties, WITNESSETH that:

WHEREAS, under date of February 27, 1930, an agreement was entered into between the parties hereto relating to the Wise Multi-Speed Transmission and matters relating thereto, and

WHEREAS, under date of May 8, 1930, a supplemental agreement was made between the parties hereto which modified said agreement of February 27, 1930, and

WHEREAS, since the execution of said agreements matters have arisen which vitally affect the situation relating particularly to the amounts which the parties then anticipated would be received from a licensee with whom negotiations were then in progress and the parties hereto recognize that by reason of the changed conditions said contracts above referred to should be modified;

NOW, THEREFORE, in consideration of the sum of One Dollar (\$1.00) in hand paid by the Second Parties to the First Party and all other valuable and sufficient considerations, receipt of all of which is hereby acknowledged by the First Party, it is agreed by and between the parties hereto as follows:

1. That the part of said agreement of February 27, 1930, and of the supplemental agreement of May 8, 1930, providing for the payment to the First Party or to the Wise Manufacturing Company, a corporation of the State of [93] California, shall be set aside, cancelled and held for naught and the Second Parties herein and the Wise Patent and Development Company, a Delaware corporation, shall be under no obligation to pay to the First Party or to the said Wise Manufacturing Company or to the Standard Die and Tool Company, Inc., the said sum of Seventy-Five Thousand Dollars (\$75,000.00) or any part thereof, but that the First Party herein shall receive in lieu thereof the consideration set forth in Item 2 of this agreement.

2. A contract was made between the Westinghouse Electric & Manufacturing Company of East

Pittsburgh, Pennsylvania, a Pennsylvania corporation, and Wise Patent and Development Company of New York, a Delaware corporation, under date of August 30, 1930, under the provisions of which the Westinghouse Electric & Manufacturing Company paid to the Wise Patent and Development Company the sum of Ten Thousand Dollars (\$10,000.00) and said Westinghouse Electric & Manufacturing Company was given the right under the provisions of said contract to acquire an exclusive license, all as fully set forth in said contract, upon the payment of an additional sum not to exceed Twenty-Five Thousand Dollars (\$25,000.00). The parties hereto agree that they are familiar with the provisions of said contract of August 30, 1930, between the Westinghouse Electric & Manufacturing Company and the Wise Patent and Development Company and are familiar with the terms and provisions thereof, and that reference thereto shall be fully made for the further identity of the sum of Ten Thousand Dollars (\$10,000.00) and the sum of Twenty-five Thousand Dollars (\$25,000.00) herein mentioned. The parties agree that the First Party herein shall receive [94] the sum of Ten Thousand Dollars (\$10,000.00) paid by Westinghouse Electric & Manufacturing Company and that if said last mentioned company shall pay all or any portion of the sum of Twenty-five Thousand Dollars (\$25,000.00) above referred to that the First Party herein shall receive any such sum or sums so paid. Provided, however, the payment of said sums to the First Party shall be by credit

to him on any sums owing by him to the Second Parties or to said Wise Patent and Development Company or to Alonzo C. Owens, of Sullivan, Indiana, but that such credits shall not be given until such a time or times as payments would have been due to the First Party under said contract of February 27, 1930, and the supplemental contract of May 8, 1930, had this agreement not been made, and until the liability of the parties hereto respectively has terminated on a note of Forty Thousand Dollars (\$40,000.00) given to the Westinghouse Electric & Manufacturing Company on August 30, 1930, by the Wise Patent and Development Company and endorsed by the parties hereto respectively.

3. The parties hereto further agree that the Wise Patent and Development Company shall be under no obligation to sell any additional preferred or common stock under the provisions of the supplemental agreement of May 8, 1930, and that the Wise Patent and Development Company may use any earnings or any net income or any funds received by it in repayment of any loans extended by the Wise Patent and Development Company, or for its account, or in the retirement of preferred stock of the Wise Patent and Development Company and in payments of dividends thereon. [95]

4. The Second Parties shall not be obligated except in their sole discretion to advance funds or to cause the Wise Patent and Development Company to advance funds to enable the First Party to acquire stock owned by others than himself and

his wife in the Standard Die and Tool Company, Inc., and in the Wise Manufacturing Company, both California companies. However, the Second Parties may, in their discretion, take advantage of all or any part of certain options now outstanding on stock in said companies.

IN WITNESS WHEREOF, the parties hereto have executed this agreement in triplicate the day and year first above written.

Roy T. Wise

First Party.

A. N. Diehl

Will H. Hays

Second Parties. [96]

THE WITNESS PETERS CONTINUED:

“I ascertained that the real property of the Wise Manufacturing Company was subject to a first deed of trust for something like \$18,000.00 which covered its real property.” Peters testified that he had not learned that the deed of trust had been foreclosed and he further testified that the company had no assets whatever other than these patents. In answer to a direct question by Mr. Clark inquiring if in checking the records of the Wise Manufacturing Company, the witness had encountered the minutes which related to the raising of from \$5000.00 to \$7000.00 upon the personal property which had been mortgaged to A. C. Owens, the witness replied that Mr. Wise had said that Owens had given him permission to sell a lathe or raise money on it because at that time the equipment was worth ap-

(Testimony of F. W. Peters.)

proximately \$60,000.00 and there was only \$25,000.00 against it.

Q. Mr. Wise also told you, did he not, that there was in the files the consent of A. C. Owens for the company to raise on these mortgaged assets the sum of \$5000.00?

A. No, I do not remember anything about that.

Q. I beg your pardon?

A. I remember nothing about that.

Q. Well, you read this resolution here dated in January, 1931, didn't you?

A. That was that lathe they had permission to sell.

Q. Read the whole resolution and tell me if you did not discuss it with Mr. Wise. Note the provision in there about borrowing \$5000.00.

A. No. The only thing mentioned about this was he had permission to sell this lathe, and nothing said about the \$5000.00.

Q. You read this resolution as a part of your investigation? [97]

A. Yes.

Q. And saw it there?

A. Yes.

Mr. Clark. I will read that resolution:

'On motion duly made and seconded, the following resolution was unanimously adopted.'

(Resolution read.)

Now, you say you did read that?

A. I probably did.

(Testimony of F. W. Peters.)

Q. And didn't Mr. Wise tell you that at that very time Mr. Owens had agreed, at the direction of Hays, that they could take the property on which he had the \$25,000.00 mortgage and subject it to a first mortgage for the purpose of raising the \$5000.00?

A. Never mentioned it."

The resolution which was read as indicated in the foregoing testimony recited that the Wise Manufacturing Company and the Standard Die and Tool Company should raise approximately \$7500.00 by selling certain of its assets for the approximate sum of \$2000.00 and by borrowing approximately \$5000.00 on its personal property, all for the purpose of raising funds to retire existing indebtedness, and that the vice president and secretary should be authorized to sell the Acme Turret Lathe for \$2000.00, and to obtain a loan for the corporation and borrow the sum of \$5000.00, and that the vice president and secretary be authorized to execute such notes and chattel mortgages as might be necessary, and that the rate of interest to be paid should not exceed 12%. This resolution, as it appears in the minutes of the Wise Manufacturing Company, at page 28, was certified to by a certificate signed by the secretary, E. W. Olin.

In answer to a question by Mr. Clerk inquiring whether the witness had gone to Mr. Woolsey to

(Testimony of F. W. Peters.)

check up and find out whether it had been arranged that he would act as trustee to [98] take everything that Wise obtained out of these contracts to hold for the stockholders, the witness replied in the negative, stating that Mr. Wise had showed him a copy of that escrow and that it was not everything, that it only pledged what he was to derive from the stock and that he told the witness at the time that the stock was pledged to Mr. Hays and if Mr. Hays foreclosed the stockholders would have absolutely nothing.

“Q. I think you have sized it up correctly. You found out that the stock that came to the Wise Patent & Development Company had been pledged for a period of over two years?”

A. Immediately when the money was advanced to Mr. Wise to buy up the stock through the escrow.

Q. And you distinctly understood it was that stock that Mr. Wise was willing to turn over to the preferred stockholders if they took it, subject to the pledge, and if they took it in proportion to their interest in the corporation?

A. Not to turn it over. He merely agreed to let them have the returns from the stock, but not the stock; and furthermore, at that time he told me that Mr. Hays—he disagreed with Mr. Hays about the sale of these chattels, and he said he could have sold them for twenty-five or thirty thousand dollars himself; and he asked me to have my stockholders

(Testimony of F. W. Peters.)

come in on that plan, and I told him, no, because if Mr. Hays foreclosed then all of the stockholders were out, and neither their creditors nor stockholders would have anything.

Q. So you, representing the stockholders, did not agree that the stock received from the Wise Patent & Development Company shall be treated as an asset of the two California corporations?

A. The stock, yes; but not the income from the stock. There is no telling what that is going to be. Mr. Wise wants to retain the stock, and merely give the shareholders the [99] proceeds of the surplus which comes in as dividends on this stock. He never offered to turn the stock over.

“Q. You never read the document he delivered to the Bank of America at all?

A. I read the one he showed me, which he gave Mr. Woolsey. The Bank of America refused to handle the escrow.

Q. Did he tell you the document he tendered to Mr. Woolsey was the same one he tendered to the Bank of America?

A. That I do not know, whether it was the same one or not. He only showed me one escrow, and it was signed by—represented \$20,000.00 of preferred stock.”

REDIRECT EXAMINATION.

The witness testified that he knew that some of the preferred stock had been purchased.

“Mr. Wise told me that when he was east he believed that the common stock was the only stock

(Testimony of F. W. Peters.)

that had a voting right, and that in order to get some of the common stock from the stockholders holding both common and preferred stock and refusing to sell the common stock unless their preferred stock was also taken up they had in some instances to purchase also the preferred stock through the escrow. All the common stock was paid for. A few shares of the preferred stock had been bought up from those people who owned common also. All the rest of the stock was just in escrow, and it had not been paid for, and the stock I represent has not been paid for and it is still outstanding.”

“Q. You heard Mr. Clark read from that complaint in the case brought by Mr. Waddell, and make reference, in one of his questions, to the statement there—to a statement that the contract of February—the terms of the contract of February 27, 1930—were set forth in that complaint?
[100]

A. I heard him say that.

Q. Have you read that—that complaint that you read in court contains such a reference?

A. No such reference whatsoever.

Q. Have you examined the complaint which Mr. Clark was reading from today?

A. I have; I just examined it.

Q. In the recess. Does it say anything about the contract of February 27, 1930?

A. There is no mention of any contract in the complaint.

(Testimony of F. W. Peters.)

Q. Does it show any knowledge on the part of Mr. Waddell of the contents of that contract?

A. None whatsoever. The gist of this cause of action is that the resolution of March 5, 1930, authorizing assignments of the patent to the Wise Patent & Development Company, and that Mr. Waddell says, 'on information and belief', he believes to be fraud; and there is no mention in here of any of the contracts entered into by Mr. Wise."

"Referring to the resolution of May 5th, 1930, and that is the one of the assignment of patents which has been read in evidence, of the Standard Die & Tool Company, I had a discussion with Mr. Wise concerning the consideration for the patent. I asked Mr. Wise for the assignment and he got the assignments out and he let me read them over. There were two of them, one from the Standard Die and Tool Company and one from Roy T. Wise personally. They recited a consideration of \$1.00 and I asked him then what the consideration was he had received, and he told me that Mr. Eltse had told him that the only flaw in the whole deal was the fact that no consideration had been received by the Wise Manufacturing Company from the Wise Patent and Development Company back east, and I asked him then about his originally telling me that the [101] consideration was \$25,000.00. I did not know differently until I saw the contract which showed that there was no consideration received by the western companies out here for that patent."

(Testimony of F. W. Peters.)

RECROSS EXAMINATION.

Mr. CLARK.—Q. Well, now, you are stating what that shows. Have you read recently the three contracts taken together?

A. No, I have only seen the first and the last contract.

Q. Well, you appreciate the rule of law that written contracts made essentially at the same time and as a part of the same transaction are to be read together?

A. These are five months, six months, or seven months, apart.

Q. Is your statement here based upon your consideration and as it is confined exclusively to the contract of February, 1930?

Mr. RESLEURE.—Objected to as argumentative.

Mr. CLARK.—He has given a conclusion.

The COURT.—Overruled. I understand the witness is giving us a conclusion about the contract.

Mr. RESLEURE.—Objected to as indefinite.

Mr. CLARK.—Q. There was no consideration for the transfer of the patents?

A. That is not my conclusion. That is Mr. Eltse's conclusion. Mr. Wise told me Mr. Eltse, the attorney for the Wise Manufacturing Company, had told him that was the only flaw, the fact there was no consideration for the transfer of the patent.

“Q. You, of course, as soon as you read the three contracts, understood it and you saw that it

(Testimony of F. W. Peters.)

was a part [102] of the three contracts, a sum of money was going to be advanced to take care of debts and to buy up outstanding stock in the California company?

A. Nothing said about debts, only going to put up \$18,000.00 to buy the stock of the Wise Manufacturing Company, and that the Wise Manufacturing Company was then to get \$75,000.00 after Mr. Wise owned all of the stock.

The COURT.—Q. You are speaking now of the contract of February 26th?

A. Yes, that is the contract of February 26th; and the contract recited—

Q. (interrupting). You notice that I am—It is in the contract some place—You notice in the contract the statement that these advances were to be made for two purposes: to clear up all of the indebtedness of the California corporations, and to buy up the stock in the California corporations?

A. No, only—the only advance for the indebtedness was the chattel mortgage on the property.

Q. And that was provided for in these instruments?

A. Not to my knowledge.

The COURT.—They speak for themselves. The question was raised by this witness: he said they showed him no consideration, or, rather, Mr. Eltse told Mr. Wise there was no consideration, as I understand it.

The WITNESS.—Yes; Mr. Eltse told him that was the flaw in the deal.

(Testimony of F. W. Peters.)

Mr. CLARK.—Q. In your checking up of the affairs of the two California companies, you found that the machinery and equipment had been sold out under this \$35,000 deed of trust and chattel mortgage—the second deed of trust—had been sold out about the middle of the year 1931? [103]

A. No, it was not. My understanding was, from Mr. Wise, it was still then in the process of being sold out when I talked to him last year.

Q. I am not speaking of the odds and ends; I am speaking of what was put in the chattel mortgage—the \$25,000 chattel mortgage. Did you ascertain, in your investigation in the middle of the year 1931, that the sale had occurred under the—what we call Owens' second deed of trust and chattel mortgage?

A. Only that Mr. Wise told me they had foreclosed and were selling the tools out, and that—

Q. (interrupting). I am not referring to the selling out by Owens after the purchase. I am referring to the foreclosure of the second deed of trust with chattel mortgage provisions on the personal property.

A. All I know is what Mr. Wise told me, and that is that the tools were being sold out by some man in Berkeley representing Mr. Hays, and at that time he was very much excited because he said the tools were worth at least \$30,000, and they had only received \$12,000 for the tools."

DOUGLAS F. SCOTT

was here called as a witness in behalf of petitioners, and after being duly sworn he testified:

DIRECT EXAMINATION.

“I live in Berkeley and I am trust officer of the First Berkeley Branch, Bank of America, in Berkeley. I had charge of Escrow No. 167. I was [104] operating under instructions from Mr. Wise and from the firm of Clark, Nichols & Eltse. On approximately the 27th day of May, 1930, we received \$25,000.00 from Mr. Hays. This was sent in a letter from Mr. Hays dated May 16, 1930. The check was for \$25,000.00 made by the Wise Patent and Development Company and was made payable to our order, drawn on Guaranty Trust Company, of New York. Our instructions were that the proceeds of that money were to pay certain accounts and notes payable as per a statement furnished us by Charles E. Van Dyne, a certified public accountant. Most of that money was used for that purpose, all except a few dollars. The next money to come into escrow was a check for \$1600.00 which was received from Mr. Hays under a letter dated June 9, 1930, and the check was made in favor of us for the purpose of paying \$600.00 for the stock of William Roberts and \$1000.00 to be paid for the stock of Mr. H. G. White. The next payment received by us was the check for \$16,623.02 of the Wise Patent and Development Company sent by Hays under his letter of September 2, 1930. We were instructed to use that money for the purpose of paying or exercising

(Testimony of Douglas F. Scott.)

options for certain common stocks as per statements furnished us by Mr. Hays. The common stock of the Standard Die and Tool Company and of the Wise Manufacturing Company. The payments totalled \$60,623.02. On September 11, 1930, we received \$1100.00 from Clark, Nichols & Eltse in the form of a check, together with a letter of instructions that the proceeds of that check were to be used to take up certain shares of preferred stock of Standard Die and Tool Company—10 shares belonging to Dubendorf and one share belonging to Wilke. The letter of instructions above referred to recited that the exercise of these options is in addition to the exercise [105] of the option set forth in the letter of Will H. Hays to your company under date of October 2, 1930. The next item received by us was a check from Clark, Nichols & Eltse on September 13, 1930, for \$1000.00 together with a letter of instructions as follows: "We hand you herewith our check for \$1000.00 to take up ten shares of preferred stock of John Jewett Earle. You are further instructed at this time to forward to Will H. Hays all preferred stock deposited in the escrow belonging to Mr. Earle, Mr. and Mrs. Dubendorf, and Fred H. Wilke totaling 21 shares." The only other money received by us was an item of \$250.00 paid by the Wise Patent and Development Company covering the fees to the bank. The first correspondence we had in connection with the escrow in arranging the agreement was a letter from Mr. Ralph R. Eltse dated March 11, 1930. This letter

(Testimony of Douglas F. Scott.)

of March 11, 1930, was received in evidence as Petitioners' Exhibit No. 7. In substance it directed the action of the bank in paying out the moneys which it received to the creditors and to the stockholders. It contained the statement 'We solicit confidence as to all matters contained in this letter.' The letter was signed by Ralph R. Eltse.

Q. Referring to the last statement in the letter, "We solicit confidence as to all matters contained in this letter"; that came to your attention, did it?

A. It did.

Q. And you observed confidence in regard to that escrow?

A. We did.

Q. Told nobody about any of the matters contained in it, did you?

A. At the time we were disbursing the money, we did not have any questions asked us other than what came through the firm of attorneys.

Q. And you refused to give them any information?

A. I mean the firm of Clark, Nichols & Eltse.

Q. As a matter of fact, you gave no information concerning this escrow other than to the firm of Clark, Nichols & Eltse?

Mr. CLARK.—I will admit Mr. Sorriek told Mr. Eltse,—asked if he could pass out the information as to any terms of the contract—in the first place, he did not have any contract at the time—the terms of the contract—Mr. Sorriek told Mr. Eltse, and Mr. Eltse stated that it was one of the conditions of

(Testimony of Douglas F. Scott.)

[106] this payoff, as provided with this cash, that the terms of the contract and the parties were not to be discussed.

CROSS-EXAMINATION
OF DOUGLAS SCOTT.

“I do not remember any direct questions by the preferred stockholders who were getting money from the escrow as to what the terms of the contract were under which Mr. Hays was providing that money, and I have no knowledge as to Mr. Sorrick having been interviewed on that subject.

“I remember that in April, 1931, there was tendered to the bank a declaration of trust, executed by Roy T. Wise. I have a letter with me, dated April 3, 1931, sent by Clark, Nichols & Eltse. At that time there had been grumbling by the preferred stockholders, who had not gotten their money. I presume they had anticipated they were going to get their money. I remember there were more options put up than were taken up—a lot more. These preferred stockholders were complaining, and they were inquiring of me, because they had not gotten their money. This escrow was completed in the year 1930 as far as paying out the money was concerned. It was not completed in so far as taking up all of the options were concerned, a certain number of the options for the stock had been held until the period of time had more than expired and the stockholders were requested to withdraw their stock. All of the common stock of the Wise Manufacturing

(Testimony of Douglas F. Scott.)

Company was taken up and paid off, excepting common stock owned by the Standard Die and Tool Company, the old parent company. I cannot answer for sure that all of the common stock of the Standard Die and Tool Company was taken up but I think it was all taken up. In addition some of the preferred stock of the Standard Die and Tool Company was taken up. We had a long list of stockholders who were perfectly willing to take their money if it [107] was paid by Mr. Hays. However, he quit sending money so the options could not be exercised. This all occurred in 1930. I know that there was discontent on the part of the stockholders who had not received their money."

"Q. And there was discontent, also, wasn't there, about what Wise was getting out of it? Wasn't that pretty noisily kicked about in Berkeley and in the bank?

A. Yes, it was, yes.

Q. It was plenty strong that Mr. Wise had some sort of a contract in which he was getting some sort of a nice profit out of it, wasn't that said?

A. I cannot remember it was actually said, but it was intimated.

Q. Rather strongly from these stockholders, in 1930?

A. Yes."

"On April 3, 1931, Mr. Eltse addressed a letter to our bank proposing that the bank act as trustee under a declaration of trust which was submitted to the bank, and the bank refused to act as trustee.

(Testimony of Douglas F. Scott.)

I have the letter dated April 3, 1931. We returned the declaration of trust to Mr. Eltse.”

The letter and the declaration of trust, so-called, referred to, and form of accompanying agreement for stockholders' signatures, were here received in evidence as the

Respondent's Exhibit "F".

This letter and the declaration of trust and agreement were admitted in the evidence after Mr. Clark had made Mr. Scott his witness, as regards the testimony concerning the so-called declaration of trust. Said letter reads:

“April 3, 1931

Bank of America
First Berkeley Branch
Berkeley, California [108]

Gentlemen: Attention: Mr. Scott.

We hand you herewith:

(a) Copy of agreement executed by Roy T. Wise;

(b) Copy of agreement to be executed by the preferred stockholders of Standard Die & Tool Company;

(c) Proposed copy of trustees certificate.

In each of said agreements an assignment is to be made to a trustee for the benefit of the preferred stockholders.

Under the agreement signed by Mr. Wise he transfers and assigns all of his right, title, claim and interest, either as stockholder, creditor or otherwise, in the Wise Patent & Development Company, including all shares of stock owned by him, subject to certain limitations therein specified.

Under the agreement to be signed by the preferred stockholders they are to assign and transfer to the trustee their respective stockholdings.

The general plan and purpose of the two agreements is that of liquidating the claims or paying the investment of the preferred stockholders out of proceeds to be derived from the Wise Patent & Development Company, a Delaware corporation, to which said Wise would otherwise be entitled as a stockholder therein or a creditor thereof. To accomplish that end it is necessary to have some one or some corporation act as trustee and we are asking your bank to consent to and to act as such trustee.

We have gone into this matter in detail with your Mr. Scott and Mr. Johnson.

After you have examined the enclosed agreements will you kindly return the same, stating whether or not your bank will act as such trustee. In the event of acceptance of the office originals of each of the agreements will be lodged with your bank.

Yours truly,

CLARK, NICHOLS & ELTSE

By RALPH R. ELTSE"

The declaration of trust, so-called, and accompanying agreement read as follows:

“KNOW ALL MEN BY THESE PRESENTS:
That

WHEREAS we, the undersigned, are each the owners and holders of preferred stock in the Standard Die and Tool Company, Incorporated, a corporation incorporated by and under the laws of the State of California, and each owns the number of shares set opposite his signature; and

WHEREAS The Wise Manufacturing Company is a corporation incorporated by and under the laws of the State of California, and the Standard Die and Tool Company, Incorporated, owns and [109] holds, among its assets, Forty-six Hundred Seventy (4670) shares of common stock of the said The Wise Manufacturing Company; and

WHEREAS heretofore the said Standard Die and Tool Company, Incorporated, and/or its officers, have transferred, assigned and conveyed to the Wise Patent and Development Company, a corporation incorporated by and under the laws of the State of Delaware, certain patents and patent rights, interests in patents and interests in inventions and applications for patents, and it is the desire of all the parties to all of said transactions to obtain the consent and approval of the undersigned to such transactions, transfers and assignments; and

WHEREAS the preferred stock so held by the undersigned in the Standard Die and Tool Company, Incorporated, is of doubtful value, and Roy T. Wise has heretofore assigned and transferred all of his right, title and interest in and to the Wise

Patent and Development Company, either as stockholder or otherwise, to....., as Trustee, for the purpose of raising funds to pay to the undersigned the amount they and each of them have invested in the preferred stock of the said Standard Die and Tool Company, Incorporated, and which assignment so made by said Roy T. Wise provides the only method and means whereby the undersigned may realize anything because of their investment in the said Standard Die and Tool Company, Incorporated;

NOW, THEREFORE, for and in consideration of the sum of One Dollar (\$1), receipt of which is hereby acknowledged, and other good and valuable consideration, and the execution of such assignment by the said Roy T. Wise, we, the undersigned hereby agree:

1. That we and each of us do hereby ratify, confirm, approve and consent to the transfer, conveyance and assignment of any and all of the patents, interests in patents and patent rights heretofore made by the Standard Die and Tool Company, Incorporated, and/or the officers of said corporation, to Roy T. Wise and/or to the Wise Patent and Development Company, of every kind and nature whatsoever, this ratification, confirmation, approval and consent being irrevocable and in no way dependent upon any other condition or conditions named in this instrument.

2. We and each of us do hereby accept the terms of the trust agreement heretofore executed by Roy

T. Wise whereby the said Roy T. Wise assigned and transferred to....., as Trustee, his right, title and interest of all kinds in and to the Wise Patent and Development Company for the benefit of the preferred stockholders of the Standard Die and Tool Company, Incorporated, and we and each of us hereby agree to and do transfer, assign, and set over our preferred stock in the said Standard Die and Tool Company, Incorporated, and agree to accept, in lieu thereof, Trustee's certificates as provided for in said trust agreement and upon the delivery to us of such Trustee's certificates hereby surrender, release and forever relinquish any right, title or interest which we may have as preferred stockholders of the Standard Die and Tool Company, Incorporated, in any of its assets, which it may now have, has had or hereafter may acquire, said interest in the said trust fund to be in full and [110] complete settlement of all of our rights as such preferred stockholders.

IN WITNESS WHEREOF we have hereunto set our hands and seals this 1st day of April, A. D. 1931.

..... owner of shares''

“AGREEMENT”

WHEREAS, the undersigned, Roy T. Wise, holds, owns and/or controls all of the outstanding common stock of the Standard Die and Tool Company, Incorporated, a corporation incorporated by and under the laws of the State of California; and

WHEREAS, The Wise Manufacturing Company is a corporation incorporated by and under the laws of the State of California, and the Standard Die and Tool Company, Incorporated, owns and holds, among its assets, Forty-six Hundred Seventy (4670) shares of common stock of the said The Wise Manufacturing Company; and

WHEREAS, the said Standard Die and Tool Company, Incorporated, has heretofore transferred, assigned and sold certain claims, patent rights and patents now held under the Wise Patent and Development Company, a Delaware corporation, and it is the desire of the undersigned Roy T. Wise to have the preferred stockholders in the Standard Die and Tool Company ratify and confirm such transfers; and

WHEREAS, it is the desire of the undersigned Roy T. Wise to protect the investment of the preferred stockholders in the Standard Die and Tool Company, Incorporated, in their investment so far as that is possible:

NOW, THEREFORE, the undersigned Roy T. Wise, for and in consideration of the sum of One Dollar (\$1) and other good and valuable consideration, the receipt of which is hereby acknowledged, and in further consideration of the ratification and confirmation by the preferred stockholders of the Standard Die and Tool Company, Incorporated, of the transfer, assignment, and sales heretofore referred to, and the acceptance by them of the benefits of this agreement, does hereby transfer, assign

and set over to.....,
as Trustee, and in trust, for the uses and purposes hereinafter set out, all of his right, title and interest of any kind and nature whatsoever, either as stockholder, creditor or otherwise in the said Wise Patent and Development Company, including all shares of stock owned by him, whether certificates have been issued therefor or not, and all interest of any kind or nature whatsoever which he may have in any of the assets of the Wise Patent and Development Company upon the following terms and conditions, to-wit:

1. It is understood and agreed that whatever interest is transferred by this assignment is subject to any debt owing by the undersigned Roy T. Wise to the Wise Patent and Development Company, and that the Trustee take whatever interest may be transferred to him by this assignment, subject to such indebtedness, including notes held by Alonzo C. Owens for the benefit of the Wise Patent and Development Company and signed [111] by Roy T. Wise.

2. It is understood and agreed that this assignment transfers to the above mentioned Trustee the equity which the undersigned may have in the stock issued by the said Wise Patent and Development Company to the undersigned and now held as collateral security by Alonzo C. Owens of Sullivan County, Indiana, and the said Alonzo C. Owens is hereby authorized and directed to deliver such certificates of stock, or the proceeds thereof, to the above named Trustee, if, when and as under said

collateral agreement such stock or the proceeds thereof, should be delivered to the undersigned.

3. The said Trustee above mentioned is hereby authorized and directed to hold the interests hereby transferred to it and to collect and apply any income arising therefrom or any distribution made because of the interest of the undersigned in and to the stock or assets of the Wise Patent and Development Company to the payment of the preferred stockholders of the amount invested by said preferred stockholders in the Standard Die and Tool Company, Incorporated, but not including any accrued dividend or interest thereon.

4. The Wise Patent and Development Company is hereby authorized and directed to pay to the said Trustee any and all dividends or income due to the undersigned Roy T. Wise, or any distribution to be made to the said Roy T. Wise because of any interest which he may have in the Wise Patent and Development Company either as stockholder, creditor, assignee, or otherwise.

5. It is expressly understood and agreed that this instrument creates no right, title or interest, legal or equitable, in the preferred stockholders of the Standard Die and Tool Company, Incorporated, except and only in the event they shall ratify and confirm the transfer heretofore referred to, and shall further accept the terms of this agreement for their benefit and shall surrender their preferred stock and the certificates therefor so that the same may be cancelled on the books of the Standard Die and Tool Company, Incorporated, and shall ac-

cept, in lieu of such stock, the certificates of the Trustee showing such surrender and cancellation and their participation in this trust and acceptance of the same.

6. The Trustee herein named is hereby authorized and directed, as sufficient moneys come into its possession because of this assignment and agreement, and when it, in its judgment, determines that it does have such sufficient funds, shall pay to the holders of the certificates issued in lieu of the preferred stock of the Standard Die and Tool Company, Incorporated, pro rata, in proportion to the amounts shown by such certificates to have been invested in the preferred stock of the Standard Die and Tool Company, incorporated, but in no event shall the holder of any such certificates receive more than the amount of such investment, without interest and without any further or accrued dividends.

7. It is understood and agreed that in the event said preferred stockholders shall be paid the amount of their investment by the Trustee hereinbefore mentioned, then this trust shall terminate and the Trustee herein mentioned shall transfer to the undersigned all the assets remaining in its possession because of this assignment. [112]

8. It is stipulated and agreed that if at the end of ten (10) years from the date of this agreement the moneys coming into the hands of the Trustee shall not have been sufficient to pay, in accordance with this assignment, to the holders of the certifi-

icates herein provided for the amount of their investment, then and in that event, Trustee herein is authorized and directed to sell such stock or stocks, interests, claims, credits of whatsoever nature he may have belonging to the undersigned, or so much thereof as may be necessary to pay off such certificate holders and preferred stockholders in the Standard Die and Tool Company, Incorporated, as have not been otherwise taken care of, and the said Trustee is hereby authorized and directed to make such sale at public or private sale as in its judgment it may deem advisable. It is hereby authorized and empowered to execute in its own name or in the name of the undersigned, any and all instruments in writing of every nature whatsoever necessary or advisable to carry out and into the effect the purposes of this agreement.

9. The undersigned, Roy T. Wise, hereby further agrees to sign and execute at the request of the Trustee, or any purchaser at any sale of the Trustee, any and all assignments, bills of sale or other instruments which shall be deemed necessary or advisable to fully transfer the interests of the undersigned in the Wise Patent and Development Company and for the purpose in carrying out the purpose of this agreement.

10. It is further understood and agreed that the terms and provisions of this agreement and assignment shall be binding upon the heirs, legatees, devisees, assigns, legal representatives and successors of the said Roy T. Wise.

IN WITNESS WHEREOF the undersigned has hereunto affixed his hand and seal this 2nd day of March, A. D. 1931.

ROY T. WISE [SEAL]

STATE OF ILLINOIS,

County of Cook.—ss.

Before me, the undersigned, a Notary Public in and for said County and State, this 2nd day of March, A. D. 1931, personally appeared ROY T. WISE, personally known to me to be the person whose name is subscribed to the foregoing instrument and acknowledged the execution of the above and foregoing agreement to be his free act and deed.

WITNESS MY HAND and Notarial Seal.

EDWIN J. CHONA

Notary Public

The undersigned hereby accepts the above trust and agrees to administer the same in accordance with its terms.

Dated this.....day of.....A. D. 1931.

.....[113]

HALSY J. WHITE,

duly sworn as a witness for petitioners, testified as follows:

DIRECT EXAMINATION.

“I reside in Berkeley and at the time I first met Mr. Wise was connected as an employee with American Investment Company, affiliate of Bank of America at Berkeley. I am at present an employee of the Bank of America in San Francisco. In January 1929, Roy T. Wise asked my assistance in selling the unsold portion of a \$30,000.00 issue of 8% voting preferred stock of Standard Die & Tool Company. I sold some of this stock to my customers. I never attended any official meetings of the preferred stockholders of the Wise Manufacturing Company. The only meeting I can recall was the one at the Mark Hopkins [114] Hotel, in San Francisco, at which time Mr. Waddell, acting as attorney for a certain group of preferred stockholders, invited me to come over, that Mr. McMahan—in fact, I understood most of the preferred stockholders would be there, to interview Mr. Hays. Mr. Hays was there. Mr. Eltse was there. Mr. Dobrzensky was there. Mr. McMahan was there. Another attorney was there with Mr. Hays whose name I cannot recall. This was March or April, 1932. There was nothing to my knowledge disclosed in regard to the contract between the Wise Manufacturing Company and the Wise Patent & Development Company. The transfer of the patents was not discussed. It was somewhat a so-

(Testimony of Halsy J. White.)

cial gathering. Mr. McMahon and Mr. Hays spent perhaps twenty minutes discussing more or less private affairs and politics and then the subject of how Mr. Hays became involved with Mr. Wise in the motor transmission came up. I gathered that Mr. Hays felt that he had been drawn into it with the hope of making money very much as the preferred stockholders had and that they both had the same difficulty. It was apparently his intention to convince the preferred stockholders that his situation was about the same as theirs and that the best that he could do for them was to suggest that they deposit their stock in escrow or accept a claim similar to his against the earnings, if and when obtained. Mr. Hays inquired whom I represented and I told him that while I had no stock of any of the three companies involved that my friends who did own this stock, would, I felt sure, not wish to accept anything more than a cash settlement for their stock. I did not make any attempt to find out anything about the patents. I never did know of nor was any mention made at that meeting about the transfer of the patents. I believe nothing was said about any contract at that meeting, in fact I am sure of it. Referring to prior times, I was a stockholder in the Standard Die and Tool Company and I did on several occasions before [115] depositing my stock in the escrow at the Bank of America at Berkeley attempt to ascertain the status of the Standard Die and Tool Company and the preferred stockholders and

(Testimony of Halsy J. White.)

the common stockholders in Standard Die and Tool Company, but I was given no satisfaction. I had five shares of common stock of the Standard Die and Tool Company. I finally deposited it in the escrow, and it was paid off later. I received for my stock the equivalent of \$200.00 a share. That was paid me as testified by Mr. Scott yesterday, coming from Mr. Hays in the form of a check for \$1600.00, \$1000.00 of which was used to take up my stock. When I asked Wise what had become of the patent and what consideration if any there was, he just could not give me the details. I asked him what the status of the company would be and its patent and he made no answer. I questioned him several times in this regard, always with the same result. At one time he stated that he was not at liberty to disclose the information or something of that sort."

CROSS-EXAMINATION OF WITNESS WHITE.

"It was approximately June, 1930, when I received my money for my stock. Some of the preferred stock was taken up from stockholders who also held common stock. Practically all of the preferred stock was not taken up. Then these preferred stockholders began to complain and among them was Mr. McMahan and other stockholders with whom I was acquainted. There were numerous complaints. I complained very much myself at the way it was being handled. I told Mr. Wise

(Testimony of Halsy J. White.)

that because of the fact that he would not disclose the facts of his deal, I thought it was unfair to the stockholders, both preferred and common. The set price was \$100.00 a share. To my knowledge no one ever asked me, and I never disclosed to anyone that I got more than the \$100.00 a share. To my knowledge I am the only one that got more than \$100.00 a share. My position there at the bank [116] was agent of American Investment Company affiliated with the Bank of America.”

The witness was asked by Mr. Clark if one of the factors that contributed to his being able to get \$200.00 a share for his stock instead of \$100.00 was that by reason of his position in the bank he knew what was going on. The witness replied that there was a great deal going on at the bank that he had no access to.

“Q. And of course you knew the patents were being transferred?

“A. Oh, no.

“Q. You knew that someone was putting up a lot of money there at the bank didn't you?

“A. It was my supposition that a deal was being made for Mr. Wise who, it was reported, was receiving \$1000.00 a month salary. I knew that a great deal of money was being put up there in the bank and that it was coming from Mr. Hays. Although I was an employee there in the bank, I had no access to these escrow files so as to know that the money was coming from Mr. Hays nor did Mr. Wise tell me that the money was coming

(Testimony of Halsy J. White.)

from Mr. Hays. The final information I had on that subject came at a time when I by chance saw Mr. Hays's check for \$25,000.00. I could not say how long after the check arrived it was that I saw it. I did not at first hear of Mr. Hays's connection. I presumed this money would go out to the great batch of creditors very shortly after I saw the check although I saw nothing of the disposition.

“Q. You were a common stockholder in this company and you knew that the creditors were filing into the bank and they were getting their money?

“A. I assumed that they would get their money.

“Q. It was common information then that at the time these contracts were being made, that instead of defrauding the creditors, all the creditors were going to be paid?

“A. I believe that is correct. No list of creditors [117] was ever submitted to the common stockholders to show whether these creditors were paid off at that time. I complained to Wise about his withholding information about the transaction between himself and the other parties interested and stated that in the absence of information I felt that I would rather not see the deal go through, that I preferred to hold my common stock as I believed that it had a value in excess of \$100.00 a share.

“Q. You were the last one of the common stockholders to take down the money that was put up for the common stock?

(Testimony of Halsy J. White.)

“A. I don’t know. I accepted it when it was turned over to me.”

“This meeting in San Francisco was after Mr. Waddell had unsuccessfully attempted to serve Mr. Hays and he come up voluntarily to discuss the matter with the preferred stockholders. Mr. Waddell had reported that for a period of five or six months previously to the San Francisco meeting, he had been unable to serve Mr. Hays in the case of *Palm v. Diehl*, the law suit that has been mentioned in the testimony here. I believe there was no mention at this meeting of any agreement whereby Mr. Hays and Mr. Wise and Mr. Diehl had become equal owners of the stock in the Wise Patent and Development Company.

“Q. You believe not? Had you heard that prior to your going there?

A. I heard the three names mentioned. It was rumored about before the meeting ever occurred that those three men had the stock of that corporation.

“Q. But its purpose was to see Hays, because at that time, and for several months prior thereto it was a known or rumored fact that Hays had received stock in this corporation and that there was some obligation on the part of Hays to make return to the stockholders of the Standard Die & Tool Company?

A. The stockholders felt they had a case against Mr. Hays. [118]

Q. You say that it is a fact that Mr. Hays stated that his situation was the same as the preferred stockholders?

(Testimony of Halsy J. White.)

A. Yes. Mr. Hays mentioned the depositing by the preferred stockholders of their stock in the Woolsey escrow and I think he referred to that as being the proper place. Nothing was said or nothing happened at that meeting about any arrangement having been made as the result of which the preferred stockholders would refrain from making service in the suit against Mr. Hays.

REDIRECT EXAMINATION
OF THE WITNESS, WHITE.

“It is a fact that I got \$200.00 a share for my common stock while everybody else received only a \$100.00 a share and that a part consideration of that payment was my refraining from insisting on getting the facts of the transfers. That was the real and true consideration. Apparently they were willing to pay \$1000.00 in order not to have to disclose the information to me. I was instrumental in having several people buy preferred stock, and after they were dissatisfied I interested myself in their behalf to find out all I could about what Mr. Wise was doing and what had become of the patents. I disclosed to the preferred stockholders only such information as I thought had any truth in it. I do not recall that I told any of them that I saw the \$25,000.00 check signed by Mr. Hays. I told the preferred stockholders that it was rumored that the creditors were being paid at the bank. I did not tell them that I got \$200.00 a share for my stock, for no one ever asked me. The original price of the

(Testimony of Halsy J. White.)

preferred stock was \$100.00 a share. My understanding is that the preferred stock was taken up only in instances where persons held both common and preferred. My particular purpose in going to this meeting was to get information concerning the situation of the company, how the company stood, and what had happened to the patent and also to express the dissatisfaction of the preferred stockholders. I did not [119] get the information that I went there for.”

CHARLES PALM,

called and sworn as a witness for the petitioners and testified:

DIRECT EXAMINATION.

“I reside in Berkeley. I am a professor of Modern History at the University. I am one of the preferred stockholders of Standard Die & Tool Company. I had ten shares. My stock was not taken up. I attended a meeting of the preferred stockholders at the Wise Manufacturing Company plant and a meeting in the office of Clark, Nichols and Eltse. I did not attend the Mark Hopkins Hotel meeting. I am quite certain that the meeting at the plant was after February 27, 1930. Mr. Wise was present also Mrs. Wise and I believe Mr. Eltse was there and also other persons. I can't remember their names. At that meeting the discussion that I recall was

(Testimony of Charles Palm.)

about the companies being in debt and the chance that the stockholders might have to pay an assessment unless something was done about it. A committee was appointed, but I could not tell you just what they were supposed to do. Either at that meeting or at the other meeting we were asked to put our stock in escrow. To the best of my recollection, no reference was made to the disposition of the patents or as to what had happened to them. I did know the company was in debt and that we might be called upon for an assessment. Prior to that meeting we had been asked to put the stock in escrow. That was in 1930, I believe, and with a promise that we would receive our money, and I put my stock up at that time. That was before the first meeting. At the second meeting nothing was said about the disposition of the patents nor about the formation of this new corporation, 'The Wise Patent and Development Company', and the only impression that I got was that the stockholders should come in under some plan. [120] At the second meeting I refused to come in because I had a feeling that my interests were not being protected; that if I came into that scheme I would throw away whatever chances I had of receiving my money. I cannot say that any questions were asked at that meeting concerning the patents. I never talked with Mr. Wise concerning the disposition of the patents. Prior to October, 1932, Mr. Waddell was my attorney and also had been the attorney for the Wise Manufacturing Company. At that time I employed Mr. Peters."

CROSS-EXAMINATION
OF WITNESS, PALM.

“Mr. Waddell was my attorney in the matter of filing the Palm suit. I procured Powers of Attorney from the rest of the people and a certain amount of money to pay Mr. Waddell. Mr. Waddell had previously been a director of the company and that was one of the reasons that I employed him. He finally brought suit against A. N. Diehl, W. H. Hays and Roy T. Wise and the Wise Patent and Development Company. I know he finally did. I had to call on him a great number of times to try to do something and he seemed to try to put it off. I verified that complaint. He asked me to sign it and I glanced at it, but I did not know what it was all about.”

“Q. You did not know you were suing Mr. Hays, Mr. Diehl and Mr. Wise?

A. Oh, yes, I knew that.

“Q. They have been referred to here as the ‘unholy three’. Had they been referred to as the ‘unholy three’ before you caused this suit to be filed?

A. No, not exactly referred to in that language.

“Q. Had they been referred to in language indicating that they were three very smart gentlemen who had succeeded in getting all the stock of the Wise Patent and Development Company?

A. Yes, I probably referred to them in that way myself. [121]

“Q. Had you had several conferences with the other professors before this time?

A. I talked it over with my colleague, Professor Stevens, several times. I talked it over briefly with

(Testimony of Charles Palm.)

Horace N. Henderson. I talked also with Patrick H. McMahon an elderly man of about seventy years of age. I believe Mr. Waddell suggested getting the Powers of Attorney, (referring to the Powers of Attorney which he received from his co-plaintiffs). Mr. Peters was not mixed up in it at that time. I had a number of meetings with Mr. Waddell to try to get him to do something before this complaint was filed in the case of Palm v. Diehl. It was my honest conviction that the facts were sufficient to justify lodging a complaint against these three men." At this point Mr. Clark asked the witness upon what his conviction was based, and the witness replied: "I had invested my money with the concern and Mr. Wise invited me to visit the plant, showed me the invention, told me about the possibilities of it, how it had been adopted by several concerns in this state, the Caterpillar, and assured me of the fact that my preferred stock had sufficient security behind it. When I invested I received one dividend a little later, and I had the feeling that it was a good concern, and that when I was asked to put my stock in escrow, and while I realize that such things will happen, I did so, excepting to get my money out of it, and later on I was informed that I would not receive my money, and I heard that the common stockholders had been paid, some of them, where a preferred stockholder owned common stock, they had been paid, and although I know very little about business, my judgment told me that it was not right, consequently I made up my mind that until I had

(Testimony of Charles Palm.)

been shown just where the money had gone and what had become of the assets which I thought were mine, belonged to me as a preferred stockholder, I thought that I would refuse to sign any additional documents.” [122] In answer to a question inquiring whether the witness had ever asked Mr. Wise what had become of the patents, he replied that he had attended this meeting to ascertain what had become of them, and the witness stated that: “If anything was said about what had become of the patents, it was not such as I was able to form a judgment as to what had happened to them.” In answer to a question inquiring if the witness knew anything wrong about the company or if he based it upon suspicion, the witness replied that it was based to a certain extent on suspicion and also that he received the impression at this meeting that they were being intimidated and that the thing did not look right to him, and that while he was not acquainted with the details of the thing, he was not satisfied; that he would have been satisfied if he had received the money that he paid for his stock. The witness’s attention was here directed to paragraph 13 in the complaint of *Palm v. Diehl*, and in answer to a question as to whether he had heard that they had formed this new corporation, The Wise Patent and Development Company, the witness replied in the affirmative. In answer to a question as to whether he had ascertained that the patents had been transferred to the Wise Patent and Development Company the witness answered in the affirmative,

(Testimony of Charles Palm.)

but stated that he had been under the impression that it was the same company with only a change in name. The witness was next asked if he had had the impression that Diehl and Hayes were interested in that company, and the witness answered that he did not know that.

“Q. Upon what did you base this particular statement? ‘That the plaintiff is informed and believes and therefore states the fact to be that the capital stock of said Wise Patent and Development Company was divided into 1000 shares of preferred capital stock of the par value of \$100.00 per [123] share, and 2500 shares of common capital stock of no par value. That plaintiff is informed and believes and therefore states the fact to be that all the said capital stock of said Wise Patent and Development Company, except for approximately five qualifying shares, is owned share and share alike by the defendants, A. M. Diehl, W. H. Hays and Roy T. Wise.’

“A. Well, that was drawn up by Mr. Waddell, I knew at the time that this was drawn up that Mr. Diehl and Mr. Hays were interested in the concern in some way.

Q. The Wise Patent and Development Company?

A. Yes, that they had arranged a deal whereby the patents were taken over by this company and then sold in some way to Westinghouse.

Q. Who told you about the Westinghouse deal?

(Testimony of Charles Palm.)

A. Mr. Waddell. I think this must have been in 1931 or thereabouts. I forget. I think I have heard that the Westinghouse Company was interested in the patents, but I did not know just what had happened with respect to the patents.

Q. You didn't know how it had been handled?

A. No.

Q. In this particular complaint, Professor, you asked that the whole deal be set aside and that the transfer to the Wise Patent and Development Company be recalled? Does it come back to your mind now that you did seek to have that done?

A. Well, Mr. Clark, to be frank with you, I relied upon my attorney, Mr. Waddell, to draw the complaint and I felt that he had my interest in mind and this is more a reflection of his knowledge of the matter than it is of mine."

"Q. He has been checking up on the matter for how long?

"A. I don't know.

"Q. Did he attend the meeting at the Mark Hopkins Hotel for the stockholders?

"A. He was the attorney at the time.

"Q. And it is your impression that he told you that he went there because the patents had been taken over by this company?

"A. No, as a matter of fact, based upon what I heard about that meeting I was rather disappointed; he did not seem to [124] take a definite stand relative to the matter.

"Q. Mr. Hays did not?

(Testimony of Charles Palm.)

“A. Mr. Waddell.

“Q. What I’m asking you is this: It was felt among you that it was at least proper to lay some sort of demand or request before Mr. Hays at that time?

“A. No, if I remember correctly, Mr. Clark, Mr. Waddell went there to see what Mr. Hays was willing to do.

“Q. On account of what?

“A. Relative to the liquidation of the company, I don’t know just what it was.”

REDIRECT EXAMINATION OF WITNESS, PALM.

“I never saw the contract of February 27, 1930, until the month of February in 1933 which was some time after I had employed Mr. Peters to act as my attorney. I did not attend the meeting at the Mark Hopkins Hotel, but I heard that Mr. Waddell did not take a very active stand at the meeting.

“I changed attorneys because Mr. Waddell did not seem to be able to make progress. There may have been political reasons. Interest in politics. That was just an assumption on my part.”

RECROSS EXAMINATION OF WITNESS, PALM.

Mr. Clark asked the witness: “Starting at what time in 1931 did you feel that you had a grievance against Will H. Hays?” The witness replied, “Well, Mr. Clark, I did not feel at that time that

(Testimony of Charles Palm.)

I had a grievance against Will H. Hays. My feeling was that something was wrong, and I had not received my money and these meetings were called, and we were called, and we were given the impression that unless we did certain things we would lose everything.”

“Q. You complained because Waddell did not go forward actively?

“A. Yes, in pushing the case.

“Q. And you felt you had a grievance against some one and that was why you went against him?

“A. Yes.

“Q. He filed that suit and that suit dragged along from [125] 1931 and you had the meeting with Mr. Hays in San Francisco and still the suit dragged along and finally you went to Mr. Peters?

“A. Yes.”

The Court asked the witness when he put his stock into escrow. The witness replied: “I had put my stock up in escrow before the first meeting of the stockholders to which I referred and then when I found some of the stockholders had been paid, because they had common stock, I took a different stand.”

EDWARD W. OLIN,

being sworn, testified as a witness for petitioners, as follows:

DIRECT EXAMINATION.

“I reside in Oakland. I am a technical expert mechanic rather than an executive. I was a director of the Wise Manufacturing Company from about November, 1929, to about January or February, 1931. I attended Board of Directors’ meetings. I don’t recall missing any meeting”. In answer to questions by both Mr. Resleure and the Court as to when he first saw or heard of the contract of February 27, 1930, the witness testified that his first knowledge of the contract was in March of 1933, when it was shown to him by Mr. Peters. That prior to that time he had no knowledge of its existence or contents. He continued: “In none of the meetings of the Board of Directors was there any discussion of, nor were we ever advised of, the terms of any transfers of patents of the Wise Manufacturing Company. I think there were about a dozen meetings of the directors. The impression we all had was that the patents were sold for \$25,000.00. I got that impression while working in the shop as shop superintendent. It was just common rumor, I don’t know who might have said it or started it. It was shop gossip. I had one share of stock. Mr. Wise went east to sell the patents and when the money came back we thought it was for the sale of the patents.” [126]

CROSS EXAMINATION
OF WITNESS OLIN.

“My stock was in the Wise Manufacturing Company. I paid \$20.00 for my share. I put it in escrow in the bank and received my pay for it. The stockholders were told to put their stock in escrow at the bank and it was understood that money had been obtained with which to pay off all of the creditors of the company. I recall the discussion of the resolution of the directors to call upon all of the creditors of the two companies to submit in writing their claims to the accountant for audit and later payment through escrow No. 167, Bank of America, Berkeley. The plan was to have all of the creditors deposit their claims. These accountants had been acting for the companies for some time. I saw them going through the books. And then at a certain time it was discussed at a meeting of the board that the creditors had received their pay. Those having claims up to December 31, 1929.” Mr. Clark asked the witness if a part of this same plan was also to have all the stockholders deposit their stock with the bank and have the stock taken up. The witness answered that he did not recall that. Mr. Clark next asked it it wasn't suggested at the meeting that the stockholders should go over there to the bank and deposit their stock certificates. “You knew you did that along with the rest of them.” The witness answered that he deposited his stock but that he did not know when it originated. The witness continued: “Later on the company became indebted to me. I do not recall

(Testimony of Edward W. Olin.)

the fact that a resolution was adopted authorizing the execution of the \$25,000.00 second deed of trust with chattel mortgage provision. This was several years ago and I have had no chance to refresh my memory. I recall that I was secretary of the company on April 11, 1930. It is undoubtedly so that over my own signature, as secretary, there appears the [127] Resolution authorizing the borrowing of \$25,000.00 to satisfy claims of creditors pending sale of corporate assets to Messrs. A. M. Diehl, Will Hays, et al. I do not remember voting for the Resolution. I remember getting the information that the \$25,000.00 check had been sent to the bank so that payment of the creditors could start and taking up of the stock. I don't know where the information came from. I was worried about keeping the doors of the shop open more than I was worried about what was going on upstairs."

"Q. In other words, they had been making it pretty lively for the corporation, hadn't they?

"A. I will say so.

"Q. And this plan which was so secret, you knew the object and purpose of what was being done, was to take up all of the stock and pay off all of the creditors?

"A. That was our impression. Personally, I had no interest in this so-called plan except that \$20.00 share of stock in the Wise Manufacturing Company.

"Q. You knew that Waddell had been an attorney for this corporation also, didn't you?

(Testimony of Edward W. Olin.)

“A. Yes, I knew that.”

In answer to a question as to whether or not he felt that these transfers were being made to defraud the creditors, the witness said: “When Mr. Wise went east we had a report from him that everything was going well and it seemed like a fine opportunity of selling the transmission to the Westinghouse people and from the proceeds of that sale we expected all the creditors would be paid and the stockholders cleaned up and the shop continue to operate.”

“I do not remember that after the concern kept going on a mortgage was put on the personal property. I remember the adoption of a resolution proposing the putting of another mortgage upon all the machinery and equipment of the plant and that Mr. Owens was called upon to consent to that and that that was for about \$5000.00, and that this was to clean up the [128] additional debts which had accumulated. I remember that they succeeded in getting from Mr. Owens his agreement to subordinate the first mortgage on the personal property so that the new chattel mortgage could be put on for \$5000.00.” In answer to a question as to whether or not he had any feeling that Owens, or Wise or Hays, any one of them, was attempting to defraud him as a creditor, the witness replied: “I had a feeling that something was wrong in January, 1931. During the several months when Mr. Wise was East I kept in almost weekly communication with him sometimes two or three letters. I was

(Testimony of Edward W. Olin.)

shop superintendent. I had nothing to do with the actual management of the plant, and during this time Mr. Wise asked me to keep the plant going and he assured me repeatedly by letter that there was \$5000.00 coming from the East and this did not come and there was money due and it got to the point that I took it up with the shop boys and showed them letters I was receiving from Mr. Wise assuring me he was doing everything he could to raise additional funds, and put it up to the shop boys themselves whether or not they would continue, knowing that they were not receiving their wages, and I also acquainted the shop with the fact that the accounts receivable we had would in a measure protect a certain portion of this wage and they elected to remain. But about January I made my mind that Mr. Wise was unable or could not possibly get \$5000.00 in the East and Mrs. Wise had made efforts to raise a \$5000.00 loan locally, which she was not able to negotiate, so about the latter part of January I decided that it had gone far enough and presented our claims to the Labor Commissioner.

“I am one of the petitioners in this matter, my claim being \$239.34. I did not know until we began to protect our wage claims about the first chattel mortgage. The meetings of the directors were held at the plant. The Resolutions [129] of the Wise Manufacturing Company were prepared by Mr. Waddell and the minutes of the Standard Die and Tool Company were prepared by Mr. Eltse. Mr.

(Testimony of Edward W. Olin.)

Wise presided when he was there, it was all in order.”

“Q. Did you know what was going on at every meeting?

“A. Yes, when I was present, everything that he cared to reveal I knew of course.

“Q. Were any papers prepared and presented for your signature after a meeting?

“A. It runs through my mind that I did sign a note as secretary of the company but I believe that was all right. I believe it was authorized. It was probably the \$25,000.00 note that I signed. At that time it was fresh in my memory, but that is three or four years ago.”

There was here received in evidence as

Respondent's Exhibit "G"

the Deed of Trust with Chattel Mortgage provisions dated May 16, 1930. In substance this instrument was as follows: It was executed by the two California corporations. It ran from them to American Trust Company as Trustee and it transferred to the Trustee as security for the payment of the \$25,000.00 note, a copy of which was attached to the instrument, the real property of the Wise Manufacturing Company and the machinery and motors of the company located in its Berkeley plant. A list of the items of personal property was set out. The instrument further contained provisions for selling

(Testimony of Edward W. Olin.)

the real or personal property together or separately in the event of default in paying the note. Attached to the instrument was a copy of a promissory note dated May 16, 1930, running from the two companies to Alonzo C. Owens. The Deed of Trust and the note were signed by the witness as secretary for the Wise Manufacturing Company.

Witness continuing:

“It has slipped my mind that I signed these instruments. [130] I remember that prior to the signing of this there was a Deed of Trust on the real property for something like \$18,000.00 and that this was unpaid.

“I employed Mr. Waddell to act as my attorney to take charge of our wage claims and he brought an action on my wage claim. I verified the complaint which Mr. Waddell prepared. He brought suit in Oakland and judgment was obtained and that is the judgment mentioned in these proceedings. Mr. Waddell was also attorney for Mr. Ralph Sites.”

It was here stipulated that the actions upon the Olin claim and upon the Sites claim were commenced April 29, 1931, and that they both went to judgment in January or February, 1932.

Here the petitioners closed their case.

There was next offered in evidence by the respondents as their

Exhibit "H"

a transfer of patents dated May 8, 1930, endorsed as recorded May 22, 1930, Liber E-144, page 275, in the records of the office of Commissioner of Patents. In this instrument Roy T. Wise transfers to Wise Patent and Development Company all rights under application dated July 17, 1929, for letters patent, the serial No. of the application being 378,862 and all rights under application dated July 24, 1929, the serial No. being 380,634, the device referred to being an invention or improvement in a constant mesh gear transmission clutch.

The respondents next offered in evidence as

Respondents' Exhibit "I",

an assignment running from Standard Die & Tool Company dated May 5th, 1930, and running to Wise Patent and Development Company, the endorsements on which showed recording on May 22nd, 1930, in Liber E-144, page 277 of the U. S. Patent Office records. This instrument purported to transfer to the Wise Patent and Development Company the patents and the rights under the patent applications which are referred to in the [131] contract of February 27, 1930, petitioners' Exhibit "3".

(Where it is stated that an exhibit was offered in evidence, the same was admitted in evidence unless otherwise indicated.)

The respondent here offered and there was received in evidence as their

Exhibit "J",

an indenture made between Frank L. Hain and Alonzo C. Owens, dated the 5th day of June, 1931. This instrument recites that the grantor, Frank L. Hain has been substituted under the trust deed (respondents' Exhibit "G" the Deed of Trust with Chattel Mortgage Provisions) and that default had occurred in paying the \$25,000.00 note and that upon proceedings duly had the personal property subject to the deed of trust had been regularly sold to the beneficiary, Alonzo C. Owens for the sum of \$12,000.00, that the sale was at public auction and that he was the highest and best bidder and that pursuant to such sale proceeding, the trustee, Frank L. Hain, and in consideration of the payment of said bid, the personal property so sold, is transferred to the said Alonzo C. Owens. The instrument contained a particular description of machinery and equipment following the description set out in the trust deed and recited that such personal property was sold to the said Owens.

There was next received in evidence as the

Respondent's Exhibit "K"

an agreement on the part of Alonzo C. Owens dated the 24th of December, 1930.

Mr. CLARK.—“Now, Mr. Resleure, I have a statement as to the stockholdings in these companies. The stockholdings in the Standard Die & Tool Company are as follows: Mr. Wise held 660 shares of the common and 5 shares of the preferred. There was outstanding in shares 34 shares of the common and 258 shares of the preferred. That represented an issue that had occurred under the Corporation [132] Commissioner’s permit up to the time these contracts were made.”

The COURT.—“Are any of the parties to this proceeding before the Court stockholders in the Standard Die & Tool Company?”

Mr. CLARK.—“They are not.”

The COURT.—“When was the Standard Die & Tool Company organized?”

Mr. CLARK.—“It was the first company that was organized, several years before the Wise Manufacturing Company was organized, I understand. Now, then, the Standard Die & Tool Company transferred its assets or agreed to transfer its assets to the Wise Manufacturing Company in consideration of the issuance of certain stock, and the Corporation Commissioner’s permit provided a certain maximum amount of stock that might be issued to the Standard Die & Tool Company in the Wise Manufacturing Company. At the time the three contracts were made there was outstanding and owned in the Wise Manufacturing Company the following stock, Standard Die & Tool Company owned 4670 shares.”

The COURT.—“Common?”

Mr. CLARK.—“It was all common, and other persons owned 216 shares. There had been subscribed 55 shares, and there were an additional 216 shares——”

The COURT.—“You say there had been subscribed.”

Mr. CLARK.—“The subscription had not been fully paid, and in addition there were 216 shares that were in escrow under the provisions of the Corporation Commissioner’s permit.”

Testimony closed.

On April 6, 1934, the Court permitted the reopening of the case. It was there stipulated by counsel that various papers which Mr. Clark had obtained from Mr. Dobrzensky’s [133] office might be placed in evidence.

There was next admitted in evidence as

Respondent’s Exhibit “L”

a copy of a letter dated January 17, 1933, from Mr. Dobrzensky to Mr. James E. Waddell, on which letter was endorsed a receipt of the same date by Mr. James E. Waddell. As a part of the same exhibit there was also received an agreement referred to in the letter of January 17, 1933, and bearing the date, April 1, 1931, together with an-

other agreement signed by Alfred E. Elkinton. The first mentioned agreement was signed by a long list of the preferred stockholders of the Standard Die and Tool Company. The letter, except date and address given above and signature, reads:

“In re: Palm v. Diehl, et als.

I hand you herewith an original agreement dated April 1, 1931, bearing the signature of numerous parties ratifying a conveyance of patent rights, etc., heretofore made by Standard Die and Tool Company, Inc., etc. to Mr. Roy Wise and/or the Wise Patent and Development Company.

This is handed to you for the purpose of securing the signatures of Mr. McMahan and associates. You will please retain this in your office and surrender possession to no one other than the undersigned.

Under the present arrangement certain moneys are to be made available to Mr. Wise and are to be used in retiring the preferred stock. The moneys available to Mr. Wise or the Wise Company will be such sums as will arise after the payment of such sums as were advanced to Mr. Wise for his account and used by him on account of the Wise California Companies.

We are agreeable that such moneys as might accrue and be paid to Mr. Wise through the ownership of his stock in the Wise Patent and Development Company should be applied first, in the repayment of loans made to Mr. Wise and used by him in the payment of debts of his California Companies; and second, in the retirement of the

preferred stock in the Standard Die and Tool Company, Inc., including the preferred stock in the present trust, as well as the stock, the owners of which have not yet subscribed to the trust; and third, in the repayment of other loans made to Mr. Wise in the premises. Under the existing arrangements all moneys advanced to Mr. Wise would be fully repaid before any moneys would be available for the outstanding preferred stock. Under the suggested arrangement the owners of the preferred stock in the Standard Die and Tool Company, Inc. would receive pro-rata the amount necessary to retire the stock before Mr. Wise would be refunded [134] moneys, due from him by reason of loans made to him which he used in the purchases in connection with the California Companies. I think it has already been conceded that the moneys which were loaned to pay off the debts of the California Companies should be first refunded.

Mr. Wise has heretofore advised us that he consents to this arrangement. In addition to the foregoing we are further willing that the amount of loans made to Mr. Wise and used by him in the payment of the debts of the California Companies may be reduced by the application to the payment of interest and principal of such net amounts as have been realized from the sale of machinery and equipment bought in under foreclosure of mortgage.

I believe that this is completely in keeping with the arrangements heretofore verbally outlined to you. In the event that the matter has not been stated herein with sufficient clarity we will be glad

to discuss with you such further assurances as may be necessary and if need be will procure the written consent of Mr. Wise to the arrangement which has been suggested.

Will you kindly acknowledge receipt of the enclosures?

The suggestions hereinbefore set forth are made on condition that Mr. McMahon and those associated with him execute the trust arrangement."

On the side of the foregoing letter is said endorsement reading:

"Received trust agreement 1-17-33, James E. Waddell."

The agreement above referred to bearing date April 1, 1931, was the same as the instrument headed "Agreement" which is a part of Respondent's Exhibit "F", excepting that the name W. P. Woolsey was inserted in the blank appearing in the 4th paragraph of the form of agreement contained in Respondent's Exhibit "F" and excepting that the agreement was signed by various persons who had also put down the number of shares claimed by them, the names of the signers and the number of shares appearing at the end of the agreement being as follows:

W. E. Woolsey, 5 sh.; William C. James, 2 sh.; Linden Naylor, 10 sh.; W. P. Woolsey, 5 sh.; Amelia Everett Bass, 1 sh.; A. W. Elkinton, 3 sh.; William E. Bowen, 1 sh.; William A. Morgan and/or Leolyn

Morgan, [135] 10 sh.; Jerry S. Thompson, 2 sh.; Ruth B. Johnson, 15 sh.; Carl W. Carlson, 1 sh.; Neill J. Cornwall, 10 sh.; Fred Zimmerman & Martin Zimmerman, 1 sh.; Peter Hanson, 1 sh.; Agnes C. Moody and/or Robert Orton Moody, 10 sh.; Perry Tompkins, 3 sh.; Louis B. Reynolds, 4 sh.

The separate agreement signed by Alfred E. Elkinton was in the same form as that which was signed by the preceding list of shareholders. After the signature of Alfred E. Elkinton there was entered "Owner of 10 shares".

Attached to the two copies of the agreement referred to was a form of trustee's certificate reciting that the holder had surrendered his preferred stock in Standard Die & Tool Company and had in writing agreed to accept the terms of the trust agreement dated March 2, 1931, in which Roy T. Wise transferred and assigned to said trustee certain properties for the benefit of such of the preferred stockholders of the Standard Die & Tool Company as should accept the terms of the said trust, place being left for the signature of the trustee.

The letter and the instruments last referred to went in as Respondent's Exhibit "L".

It was stipulated that Mr. Dobrzensky, if he were present, would testify that the papers constituting the above exhibits of respondent were first given to Mr. Waddell as attested on Mr. Dobrzensky's letter and then that after this particular plan of settle-

ment broke down, Mr. McMahon refusing to enter into it and probably some of the other preferred shareholders, Mr. Waddell brought these papers back to Mr. Dobrzensky's office.

There was next admitted as

Respondent's Exhibit "M"

a letter from Hays and Hays to Mr. Dobrzensky dated August 23, 1932, for the purpose of fixing the time of the meeting in San Francisco and the letter refers to the fact that the meeting was held August 15, 1932.

The witness,

FREDERICK W. PETERS,

was here recalled as a witness for the respondent and he testified:

Mr. CLARK.—Q. Mr. Peters, in cross-examining you, I looked at the date on the agreement which I understood—copy of the agreement which I understood had been signed by [136] various of the preferred stockholders, and noted that it was signed as of April 1, 1931, and in my questions to you I examined on the theory that there were two of those agreements. You mentioned that Mr. McMahon, for certain reasons, had declined to go forward with the trust agreement. You did ascertain that?

The WITNESS.—A. No, it was not McMahon; it was the Bank of America had refused to act as trustee.

(Testimony of Frederick W. Peters.)

Q. Then you referred to the W. P. Woolsey trust in which he was the trustee?

A. Yes.

Q. And your check-up showed that until this blew up for failure of some of the stockholders to concur in it, Mr. Woolsey, insofar as stockholders who had signed was concerned, was to act as the trustee?

A. Yes, I believe I saw a blank copy of that agreement that Mr. Wise showed me.

Q. You saw a copy of the trust agreement that Mr. Wise had shown you, and W. P. Woolsey, as referred to in this paper here, was proposing to act as trustee instead of the Bank of America?

A. That is right.

Q. And there was only one of these attempted trust agreements and not two, insofar as signing up all the preferred stockholders was concerned?

A. I really don't know, Mr. Clark.

Q. You only learned about one?

A. Yes, the one I heard about, the bank.

Q. And you only learned of there being one attempted trust arrangement, in which the signing stockholders were to be the beneficiaries of the trust?

A. I only saw one agreement; that was the W. P. Woolsey agreement.

It was here stipulated that at the meeting in San Francisco which was held at the Mark Hopkins Hotel and which was attended [137] by Mr. Hays,

Mr. Waddell, Mr. White and the other persons referred to in the testimony that the Palm suit was discussed, that Mr. White asserted himself as being, so far as the people he appeared for were concerned, opposed to this trust agreement, his opposition being based on the fact that he did not have sufficient facts on which to base a consent; that words occurred between Hays and White and that Mr. Hays stated to Mr. White that he had better not threaten any actions.

The foregoing Narrative Statement of Evidence, prepared under Equity Rule No. 75 is hereby settled as being true and complete, and is hereby approved.

Dated August 28, 1934.

A. F. ST. SURE.

STIPULATION.

It is stipulated the above and foregoing narrative statement of the evidence in the within entitled case may be signed by the Court.

Aug. 27, 1934.

CLARK, NICHOLS & ELTSE,

Attorneys for Respondent.

RESLEURE, VIVELL & PINCKNEY,

Attorneys for Petitioners.

[Endorsed]: Filed Aug 25, 1934, 11:15 A. M.
Walter B. Maling, Clerk. [138]

[Title of Court and Cause.]

PETITION FOR AN ORDER
ALLOWING APPEAL.

To the above entitled Court, and the Honorable
Judges thereof:

WHEREAS the WISE MANUFACTURING COMPANY, Respondent in the above entitled proceeding, considers itself aggrieved by the order of the above entitled court, rendered in the above entitled proceeding, declaring and adjudging said respondent a bankrupt for the reasons and because of the errors set out in the Assignment of Errors presented and filed with this Petition,

NOW, THEREFORE, the said respondent does hereby appeal from the aforesaid order to the United States Circuit Court of Appeals for the Ninth Circuit, upon all of the grounds and for the reasons specified in the Assignment of Errors filed herewith, and prays that said appeal may be allowed and that a citation in due form shall be issued herein directed to the petitioners in the above entitled proceeding, commanding them to appear before the said Circuit Court of Appeals to do what may be adjudged to be done in the premises, and that a transcript of the record, proceedings and papers upon which said order was made shall be [139] duly made and authenticated and sent to the aforesaid Circuit Court of Appeals, and that such other and further order may be made as may be proper.

Dated June 1, 1934.

CLARK, NICHOLS & ELTSE,
G. CLARK,

Attorneys for Respondent

ORDER ALLOWING APPEAL.

In the above entitled cause (mentioned in the petition to which this order is attached) it is ordered that the appeal therein prayed for shall be and the same is hereby allowed, and the court hereby fixes the amount of the cost bond to be given by the respondent on said appeal at the sum of \$250.

Dated June 1, 1934.

A. F. ST. SURE,
United States District Judge.

[Endorsed]: Filed Jun 1, 1934, 10:12 A. M.
Walter B. Maling, Clerk. [140]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

The respondent in this proceeding, in connection with its Petition for Writ of Error, makes the following Assignment of Errors, which it avers occurred in the trial and determination of this proceeding:

1. The court erred in refusing to strike out the amended petition filed herein, on the ground that the same was not in law an amendment of the original petition filed herein on March 30, 1933.

2. The court erred in refusing to dismiss the amended petition filed herein, on the ground that the same was not an amendment of the original petition filed herein.

3. The court erred in determining that the original petition filed herein could be amended by the filing of the amended petition herein.

4. The court erred in finding and determining that respondent concealed an asset or item of property of respondent in that it concealed the so-called contract of February 27, 1930, the fact appearing that the said contract was changed in vital particulars and superseded by later written contracts executed by the same parties, with respect to the same subject matter. [141]

5. The Court erred in treating said so-called contract of February 27, 1930, as representing the rights of respondent, whereas it distinctly appeared from the evidence that said contract was not in force, that it had been altogether changed, and that the petitioning creditors knew this more than four months prior to March 30, 1933, the time of the filing of the original petition herein.

6. The Court erred in finding and determining that concealment from the creditors of respondent of the contract mentioned in Paragraph V(a) of the amended petition did in fact occur.

7. The Court erred in finding and determining that concealment from the creditors of respondent of the contract mentioned in Paragraph V(a) of the amended petition occurred within four months prior to filing of the original petition on March 30, 1933.

8. The Court erred in finding and determining that concealment of said contract occurred within

four months prior to the filing of the amended petition.

9. The Court erred in refusing to find and hold that the contract of February 27, 1930, mentioned in Paragraph V(a) of the amended petition was not the contract under which the patents therein referred to were transferred and held.

10. The Court erred in refusing to hold and determine that the petitioning creditors did have knowledge of the making and existence of the contracts which represented the arrangements under which the patents referred to were transferred more than four months prior to March 30, 1933.

11. The Court erred in finding and determining that respondent could be adjudicated a bankrupt and in adjudicating [142] respondent a bankrupt for concealment of property or for wrongs other than those charged in Paragraphs V(a) and V(b) of the amended petition.

12. The Court erred in finding alleged acts of concealment or wrongdoing which were not alleged, and in basing the order of adjudication thereon.

13. The Court erred in finding acts of concealment and wrongdoing on the part of the respondent which were entirely outside of what was alleged in the amended petition, and in basing the order of adjudication thereon. Nothing but the contract of February 23, 1930, is referred to in Paragraph V(a). The evidence showed that that contract did not exist, that it did not represent the arrangement under which the patents were held. The allegation

that said contract was an asset of the respondent was untrue.

14. The Court erred in finding and determining that concealment from the creditors of respondent of the property mentioned in Paragraph V(b) of the amended petition did, in fact occur.

15. The Court erred in finding and determining that concealment from the creditors of respondent of the contract mentioned in Paragraph V(b) of the amended petition occurred within four months prior to the filing of the original petition of March 30, 1933.

16. The Court erred in finding and determining that concealment of said property occurred within four months prior to the filing of the amended petition.

17. The Court erred in refusing to find and to hold that over a year prior to the filing of the amended petition the bank deposit and moneys referred to were used up and ceased to be an asset of the respondent corporation. [143]

18. The Court erred in making an order adjudicating respondent a bankrupt.

19. The Court erred in finding and determining that respondent had concealed its property from its creditors with a view to hinder, delay and defraud them and within four months prior to the time of filing of the original petition herein on March 30, 1933.

20. The Court erred in finding and determining that respondent had concealed its property from its

creditors with a view to hinder, delay and defraud them and within four months prior to the time of the filing of the amended petition herein.

21. The Court erred in overruling the preliminary objections made to the taking of testimony as to declarations or statements made by Roy T. Wise, upon the ground that the said Roy T. Wise did not have authority to speak for or bind the respondent by his statements or admissions. The objections referred to were, with the consent of the Court, made at the very outset of the taking of the testimony of the witness Peters. The objections were repeated from time to time, and they were all overruled. The objections referred to were those objections which went to the whole of the testimony of the witnesses to the declarations or statements of Roy T. Wise, offered for the purpose of showing the respondent had concealed the execution of the contracts under which the patents referred to were transferred.

WHEREFORE the respondent prays that the order of the District Court adjudicating the respondent a bankrupt may be reversed.

Dated, June 1, 1934.

G. CLARK,
CLARK, NICHOLS & ELTSE,
Attorneys for Respondent.

[Endorsed]: Filed Jun 1, 1934, 10:12 A. M. Walter B. Maling, Clerk. [144]

[Title of Court and Cause.]

AMENDED PRAECIPE.

To the Clerk of the above entitled Court:

Please prepare in the above cause a transcript of the record to be transmitted to the United States Circuit Court of Appeals of the Ninth Circuit in pursuance to the appeal heretofore taken in said cause by the Wise Manufacturing Company, and include therein the following:

1. Original petition, filed March 30, 1933.
2. The order, dated May 31, 1933, granting permission to file amended petition.
3. Amended petition.
4. Answer to amended petition.
5. The findings.
6. Statement of evidence under Equity Rule No. 77 to be hereafter prepared and lodged with the clerk, pursuant to Equity Rule No. 75.
7. Order adjudicating appellant a bankrupt.
8. Petition for and order allowing appeal.
9. Assignment of errors.
10. Praecipe for transcript, or stipulation as to context of record if stipulation obtained.
11. Citation on appeal.
12. Clerk's certificate to record.

CLARK, NICHOLS & ELTSE,

Attorneys for Appellant.

Dated, Aug. 30, 1934.

[Endorsed]: Filed Aug 30, 1934, 11:48 A. M.
Walter B. Maling, Clerk. [145]

[Title of Court and Cause.]

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD ON APPEAL.

I, Walter B. Maling, Clerk of the United States District Court, for the Northern District of California, do hereby certify that the foregoing 145 pages, numbered from 1 to 145, inclusive, contain a full, true, and correct transcript of the records and proceedings in the Matter of Wise Manufacturing Company, a corporation, In Bankruptcy, No. 23,049-S, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of twenty-one dollars and seventy-five cents (\$21.75) and that the said amount has been paid to me by the attorneys for the appellant herein.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 31st day of August A. D. 1934.

[Seal]

WALTER B. MALING,
Clerk.

By C. M. TAYLOR,
Deputy Clerk. [146]

[Title of Court and Cause.]

CITATION.

UNITED STATES OF AMERICA.—ss.

To the petitioners in the above entitled proceeding,
and to their attorneys and solicitors of record:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, on the 30th day of June, 1934, pursuant to the appeal duly obtained and filed in the office of the Clerk of the United States District Court for the Northern District of California, in a case entitled "In the Southern Division of the United States District Court for the Northern District of California, Second Division, In the Matter of Wise Manufacturing Company, a corporation, Respondent, No. 23,049, Bankruptcy", the Wise Manufacturing Company, a corporation, being the appellant, and E. W. Olin, Ralph Sites and Berkeley Pattern Works being the appellees, and you are required to show cause, if any there be, why the order and [147] decree in said appeal mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS the HONORABLE A. F. ST. SURE, United States District Judge, for the Northern District of California, this 1st day of June, 1934, and of our independence the 158th.

A. F. ST. SURE,
United States District Judge.

[Endorsed]: Service of the within citation admitted this June 1, 1934.

RESLEURE, VIVELL & PINCKNEY,
Attorneys for Petitioners.

Filed June 1, 1934, 11:22 A. M. Walter B. Mal-
ing, Clerk. [148]

[Endorsed]: No. 7604. United States Circuit Court of Appeals for the Ninth Circuit. Wise Manufacturing Company, a Corporation, Appellant, vs. E. W. Olin, Ralph Sites and Berkeley Pattern Works, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed August 31, 1934.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

